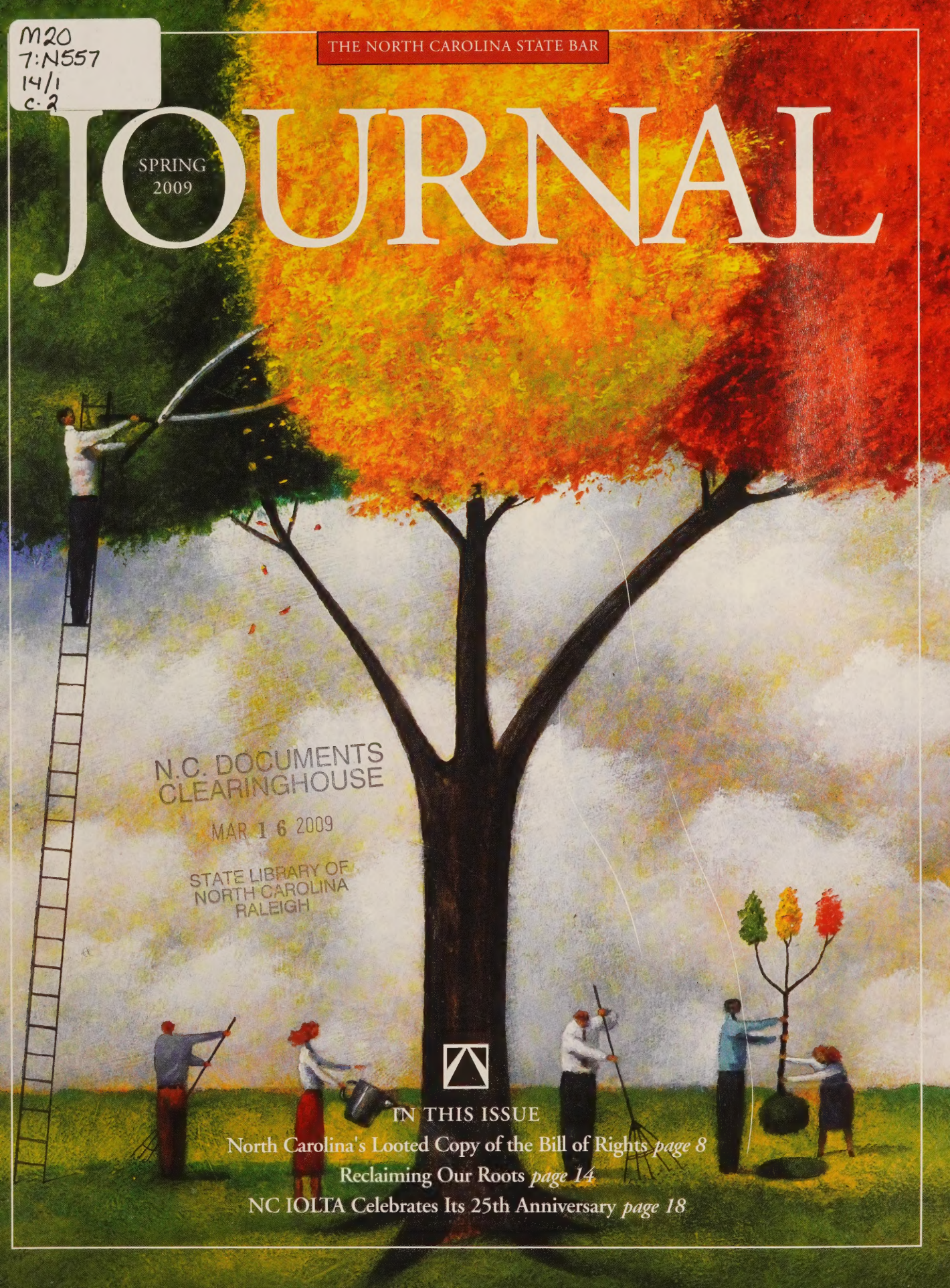
THE NORTH CAROLINA STATE BAR

JOURNAL

SPRING
2009



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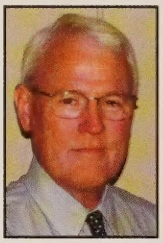

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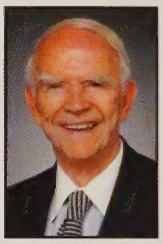

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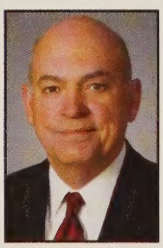

Richard Conner, Greensboro
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THE
NORTH CAROLINA
STATE BAR
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Spring 2009
Volume 14, Number 1

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 The *North Carolina State Bar Journal* (ISSN 10928626) is published four times per year in March, June, September, and December under the direction and supervision of the council of the North Carolina State Bar, 208 Fayetteville Street, Raleigh, NC 27601. Member rate of $6.00 per year is included in dues. Nonmember rates $10.68 per year. Single copies $3.21. The *Lawyer's Handbook* $10.68. Advertising rates available upon request. Direct inquiries to Director of Communications, the North Carolina State Bar, PO Box 25908, Raleigh, North Carolina 27611, tel. (919) 828-4620. Periodicals postage paid at Raleigh, NC, and additional offices. Opinions expressed by contributors are not necessarily those of the North Carolina State Bar. POSTMASTER: Send address changes to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. The *North Carolina Bar Journal* invites the submission of unsolicited, original articles, essays, and book reviews. Submissions may be made by mail or e-mail (ncbar@bellsouth.net) to the editor. Publishing and editorial decisions are based on the Publications Committee's and the editor's judgment of the quality of the writing, the timeliness of the article, and the potential interest to the readers of the *Journal*. The *Journal* reserves the right to edit all manuscripts.

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Update Membership Information: Members who need to update their membership information must do so by contacting the Membership Department via one of the four following methods: (1) log on to the Member Access section of the State Bar's website (www.ncbar.gov); (2) mail changes to: NC State Bar, PO Box 25908, Raleigh, NC 27611-5908; (3) call (919) 828-4620; or (4) send an e-mail to lchildree@ncbar.gov. **In deciding what address to list with the State Bar, be advised that this address will be used for all official correspondence from the State Bar and that membership information is a public record pursuant to the NC Public Records Act.**

Contents

DEPRESSION, STRESS, CAREER ISSUES, AND ADDICTIONS. BELIEVE IT OR NOT, THIS IS AN UPLIFTING STORY.

Actually, there are many stories. Every one of them about someone in the legal field.

Lawyers are as vulnerable to personal and professional problems as anyone else.

Competition, constant stress, long hours, and high expectations can wear down even the most competent and energetic lawyer. This can lead to depression, stress, career problems, relationship issues, financial problems, or alcohol and substance abuse.

So where's the uplifting part? That's where we come in.

The Lawyer Assistance Program was created by lawyers for lawyers. While we started as a way for attorneys to deal with alcohol related problems, we now address any personal issue confronted by those in the legal profession.

Our message to anyone who may have a personal issue, whether a lawyer, a judge, or a law student, is don't wait. Every call we take is confidential and is received by a professional staff person. You can be confident that you're talking to the right person and that no one will know about it.

We understand what it's like to face personal problems within the profession, because we only help lawyers.

Our service is not only confidential, it's free, paid for with your yearly bar fees.

If you have a personal issue, or know someone who does, we can be the crucial first step in turning things around, a role we've played for many of your peers.

We have countless success stories we could tell, and yes, they are uplifting. But we do our work quietly, confidentially, and professionally so the stories will stay with us.

We're here for you. Visit **www.nclap.org**, call **1-800-720-7257** or email@nclap.org.

We can help if you get in touch with us.

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LAP
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FRIENDS

FOR THE ISSUES OF LIFE IN LAW

Between the Quarters

By John R. McMillan

The president gavels the quarterly meeting to a close, and the members of the council depart for the return trips to their homes across the state. Members of staff trudge up Fayetteville Street pulling their wheeled briefcases. Back at the State Bar offices, files are put away and phone calls returned. Minutes of just-completed meetings are drafted. As is the case with all State Bar quarterly meetings, it has been a long week—early mornings and late nights—but the next cycle now begins.

In the Office of Counsel, there are 742 pending grievance files. 121 of those files are stayed for one or more of a variety of reasons and 46 have been referred to a judicial district grievance committee for consideration. 123 have been through the staff process and are ready for consideration at the next quarterly meeting of the Grievance Committee. So as the new quarter begins, there are 452 files in various stages of investigation out of a total of 1,543 files that were opened in 2008. Katherine Jean and her staff of ten attorneys and ten investigators will process those files as well as many new files over the next quarter. Each month Don Jones and his Investigations Department open between 120 and 130 grievance files. In early April, the reports of counsel and back-up materials will be transmitted to members of the Grievance Committee for review prior to the April quarterly meeting.

During the quarter just past, staff attorneys completed 11 disciplinary, disability, and reinstatement cases before the Disciplinary Hearing Commission. Root Edmonson traveled to Watauga County and obtained an order appointing a "caretaker" for the practice of a lawyer. In Forsyth County, Root negotiated a consent order transferring a lawyer to disability inactive status. Other lawyers in the Office of Counsel sought and obtained preliminary injunctions prohibiting lawyers in Raleigh, Wilmington, Charlotte, and Durham from handling entrusted funds. During the past quarter, staff lawyers negotiated the surrender of the law licenses of three attorneys who had misappropriated client funds. In all of those instances, the staff of the State Bar was working to protect the public from lawyers who failed to live up to the standards we have set for ourselves. Similar activities will continue throughout the year.

Luella Crane and her staff of five people in the Attorney-Client Assistance Program are busy answering telephone calls, letters, and e-mails from members of the public who are dissatisfied with the efforts of their attorneys. During 2008, those requests for assistance reached 19,452, a slight reduction from prior years. It is believed that the decline resulted from the availability of the nonlawyers website (www.ncbar.gov/public). Typically, a client will call or write complaining about a lawyer's failure to do something, and one of our public liaisons will communicate with the lawyer and attempt to mediate the disagreement. These informal mediations are frequently successful and put the relationship between the lawyer and the client back on track, avoiding the filing of a grievance and all the work that entails. This is a service to the public, and also the lawyer, but the process is labor intensive and time-consuming.

Meanwhile, back on the third floor, lawyers with the Office of Counsel are preparing censures, reprimands, admonitions, letters of warning, and letters of caution issued by the Grievance Committee at the previous meeting. Letters of notice are prepared for new grievances, responses to previously sent letters of notice are reviewed, and follow-up work begins. Complainants call with questions and concerns about their grievances. Word comes about a lawyer needing to be placed on disability and another investigation is launched. The work goes on.

Down the hall, David Johnson is busy responding to complaints about nonlawyers engaging in the unauthorized practice of law. There are also outfits of every description from out of state trying to extract money from North Carolina residents for one type of legal assistance scam or another. He typically receives 10-15 new complaints that warrant investigation every month. Each investigation involves legal research, consultation with other agencies, preparation of reports of counsel, and recommendations to the Authorized Practice Committee. When authorized, complaints must be filed, followed by discovery, motions, entries of orders, and occasionally trials. Our staff is called upon to protect North Carolina residents from the unscrupulous actions of others, and for David Johnson it is a full-time job.

On the second floor, Alice Mine, Suzanne Lever, and Nichole McLaughlin are fielding inquiries from lawyers seeking advice on whether a particular course of conduct is permitted or required by the North Carolina Rules of Professional Conduct. We encourage these questions and are glad to provide the advice and counsel sought by North Carolina lawyers. In fact, our staff responded to 5,743 such inquiries last year—well over 100 each and every week. The Ethics Committee frequently refers requests for opinions to subcommittees that meet between the quarterly meetings; Alice, Suzanne, and Nichole staff those sub-committees and prepare draft ethics opinions for discussion.

Jennifer Duncan is our director of communications. Although she is best known as the editor of the *Journal*, there are other publications such as the *Intervenor Newsletter* for the LAP, the *Lawyers Handbook*, the Pictorial Directory, and various meeting programs that also fall under her jurisdiction. Typically 68

pages, the quarterly *Journal* is the State Bar's main publication and contains a vast amount of information and many insightful articles. Jennifer is also constantly updating the State Bar's seven websites.

Wearing her other hat, Luella Crane and her staff are involved with trying to work out fee disputes between lawyers and their clients. Typically, the State Bar staff is involved in 700 fee disputes each year.

Root Edmonson and David Frederick investigate close to 200 requests for reimbursement from the Client Security Fund every year. Over the life of the fund, reimbursements of losses caused by the wrongdoing of lawyers have amounted to over $6.6 million.

The Lawyers Assistance Program is ably administered by Don Carroll, Ed Ward, and Towanda Garner who coordinate the activities of 98 Friends volunteers and 133 PALS volunteers dedicated to helping lawyers with mental illness or substance abuse problems. The LAP Board is chaired by Councilor Mark Merritt, and close to 500 lawyers benefit from the efforts of all of these people every year. Those lawyers as well as the public are well served by this program.

Wearing her specialization hat, Alice Mine and two other staff respond to questions about the certification program, process applications, work with eight specialty committees, and have substantial involvement with all applicants for certification and recertification. They defend appeals of denial of certification and recertification, analyze data from graded specialty examinations, and plan retreats for the board.

Four full-time staff members are required to carry out the duties of the Membership Department. They process annual dues, malpractice insurance reporting, and IOLTA registration of trust accounts. They maintain the membership database by updating membership information from phone calls, e-mails, letters, and death notices. Not only are individual lawyer records maintained, but PCs, PLLCs, and interstate law firms come under their watch.

Other activities that continue between quarterly meetings include the random trust account audit program, LAMP (Legal Assistance for Military Personnel) Committee, the North Carolina Conference of Bar Presidents, the Board of Paralegal Certification, the Board of Continuing Legal Education, the Board of Law Examiners, the Disciplinary Hearing Commission, and the IOLTA Board of Trustees. I encourage you to read the articles in the *Journal* that from time to time elaborate on the work these boards are doing.

In the cramped confines of his corner office, Executive Director Tom Lunsford is scratching his head trying to think of a topic for the next quarter's *Journal* article. In the meantime, he has to take time out to field yet another inquiry from one of his officers seeking information about some idea he or she has come up with in the night. Just another day in the State Bar office between the quarterly meetings. ■

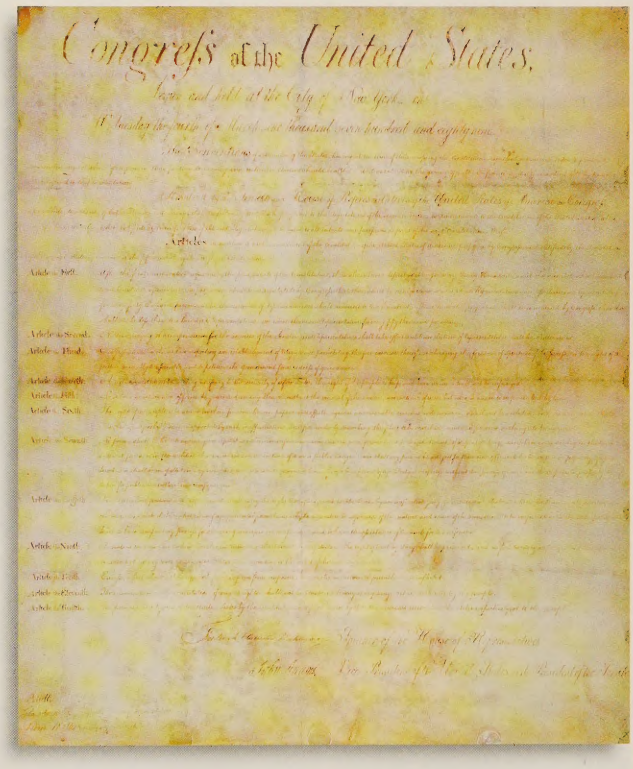
McMillan earned both his BA and JD degrees from the University of North Carolina at Chapel Hill. He was admitted to the practice of law in 1967. That same year he joined the firm withwhich he still practices—Manning, Fulton & Skinner, PA.

Lost and Found: The Curious Journey of North Carolina's Looted Copy of the Bill of Rights

By Governor Mike Easley

"The document you are attempting to sell, though clearly the property of the State of North Carolina, is not important enough to engage in controversy over. So long as it remains away from the official custody of North Carolina, it will serve as a memorial of individual theft. Since this fact must be clear to anyone acquainted with history and law, not to mention honor, it is interesting to note the present whereabouts of the document and to speculate on how long the joy of illegitimate possession can hold out against scruples arising from intelligent consideration of the facts involved."

—Robert B. House, NC Historical Commission Secretary, to a broker wanting to sell North Carolina its original copy of the Bill of Rights, 1925



On a chilly February afternoon in 2003 the only scheming on my mind was how to balance the state budget and bring North Carolina out of its economic slump. It was a Friday. I was working hard to write a strong and convincing State of the State address.

When I got off the telephone with Pennsylvania Gov. Ed Rendell, there was a new challenge for North Carolina to pursue. It would take more than five years, but

in the end a team of state and federal lawyers and law enforcement officials would win the return of North Carolina's copy of the original Bill of Rights. It had been stolen away from the Capitol during Gen. William Sherman's April 1865 Union occupation of Raleigh.

It might have been a "ripped from the headlines" plot for a TV drama. There was a mysterious disappearance, a series of shady contacts, characters entangled in corruption investigations, a dramatic undercover sting operation, and impassioned courtroom battles. But I am getting a little ahead of the story.

At the dawn of the American democracy, with a letter from President George Washington dated October 2, 1789, each of the original 13 states received a handwritten copy of the original first 12 constitutional amendments passed by Congress. Ten of those, which became the Bill of Rights, were ratified by the states.

Two hundred four years later Rendell, who had barely been governor a month, was calling me on behalf of the National Constitution Center in Philadelphia. He was a board member and said the center had been offered an opportunity to buy an original copy of the Bill of Rights. A handwriting expert had earlier determined that the Bill of Rights in question had probably been North Carolina's original copy. But Pennsylvania had no interest in paying $5 million for the document if North Carolina was going to claim rightful ownership.

Did North Carolina want to share in the purchase of the purloined parchment? No, and history made clear what course to take. I wanted our Bill of Rights returned to North Carolina where it rightfully belonged. I waited several days to call him back as I set in motion what I considered the best option to make sure we recovered our Bill of Rights.

Civil War Theft

During the 1865 Union occupation of Raleigh, William Sherman's army showed contempt for the North Carolina Capitol, galloping through the halls on horseback and destroying nearly everything they did not steal or plunder. One Union soldier from Ohio snatched the Bill of Rights from the wall of what later became my office. He took it, not to protect the sanctity of the document, but to personally cash in on its value. The occupiers tried to burn the historic Capitol, setting fires in the rotunda. Since it was rebuilt completely of stone, following a devastating fire about 30 years earlier, the Capitol still survives today.

This was not the first time North Carolina had been offered the opportunity to buy our own property. In 1897 Charles Shotwell, an Indiana businessman who said he purchased North Carolina's Bill of Rights from that Union soldier some 30 years earlier, offered to sell it back to North Carolina. While the state did respond, Shotwell and the state could not agree to terms.

In 1925 Mr. Shotwell, apparently in need of cash, approached state officials again with an offer to sell the Bill of Rights. Robert B. House, secretary of the state Historical Commission who would later lead the University of North Carolina, replied unflinchingly that the state would never pay for something that rightfully belongs to all North Carolinians. "So long as it remains away from the official custody of North Carolina, it will serve as a memorial of individual theft," House replied to the New York City broker in the scheme.

For another 75 years the document disappeared into obscurity. Then, in October 1995, a Washington, DC, lawyer contacted then Cultural Resources Secretary Betty McCain with a breathless offer to have the state buy its Bill of Rights, with an asking price of between $3 million and $10 million. If the state did not act quickly, those who had the Bill of Rights had other "alternatives available to them." Those alternatives included wealthy collectors in Hong Kong and the Middle East with "the kind of money… that is burning holes in people's pockets—people for whom possession of a historic US document would be like a small military victory."

While there was brief consideration of using private funds to make the purchase, the state's previous stand of refusing to pay for its own property prevailed.

Scheme is Hatched

After I received the initial call from Gov. Rendell, I decided it was time to bring these offers to an end. Once and for all this founding document of our democracy needed to be declared North Carolina's own and returned to the place from where it had been unlawfully taken.

On the table were three options: have the National Constitution Center purchase the Bill of Rights with North Carolina's agreement and arrange to have the document displayed in the state on a regular basis while the center would be its permanent home; have North Carolina contribute to the purchase and work out display and other arrangements; or have North Carolina claim rightful ownership and devise a method to bring the Bill of Rights back to the people of the state, no charge.

I could not stop thinking of my days prosecuting drug traffickers when we used "sting operations." I assembled my legal team, determined we would not buy back our own public record. But we might pretend to buy it. We would enlist the help of the National Constitution Center, Pennsylvania and federal officials, and set out to bring our Bill of Rights home. Like me, Gov. Rendell had once been a district attorney. I knew he shared my sense of justice but I was reluctant to involve him since it would put him in an awkward position with his board, and his state.

We brought together Reuben Young, Andy Vanore, and other lawyers from my office, the NC Attorney General's Office, the US Attorney's Office, the FBI, and the US Marshal's Service. In 1977 the NC Supreme Court ruled, in *North Carolina v. B.C. West Jr.,* that public ownership of records could never be broken. Because of that decision, an August 26, 1790, letter from President George Washington to the governor and NC Council of State welcoming North Carolina into the Union upon ratification of the Constitution, was returned to the state. The law was on our side.

We wanted to set up a sting, to be planned and executed by federal agents, but there was some initial trepidation on the part of the National Constitution Center staff. There was little question that the offer was genuine and they did not want to scare off the sellers. I made it clear: "Under no circumstance will North Carolina transfer title of the document to anyone," I instructed my legal staff.

Within just a few days the plan was ready to go into action with the federal authorities, state officials in Pennsylvania and the National Constitution Center, which agreed to pose as the willing buyer. Everyone had a role to play, especially the US Attorney's Office and the FBI.

The Sting

Early on the afternoon of Tuesday, March 18, 2003, in the law offices of Dilworth Paxson on the 32nd floor of the Mellon Bank Center, a 54-story skyscraper in downtown Philadelphia, the deal went down. FBI Agent Bob Wittman, a documents expert, posed as a wealthy philanthropist who made millions on the Internet, wanting to buy an original copy of the Bill of Rights and make it the crowning icon for the soon-to-open National Constitution Center. Nobody did a better job of role playing than FBI Agent Wittman. Although he was not an expert in ancient or archived historical pieces, he knew more than enough to play the part of a knowledgeable collector. Dealers at this level are sophisticated and could easily be spooked by even a legitimate buyer. One slip of the tongue, a wrong gesture or a slight pause could give the plot away. Wittman, as good as he was, had to feel the pressure knowing that if he made even a tiny mistake, the original copy of the Bill of Rights might not surface again during his lifetime.

For this first meeting, lawyers for Dilworth Paxson drew up stacks of legal documents for transfer of the Bill of Rights to make the charade appear even more authentic. Wittman and the other federal agents in the suite were armed with a $4 million cashiers check and a civil seizure warrant, ready to spring as soon as the Bill of Rights appeared. John L. Richardson, representing Wayne L. Pratt, Inc., a prominent antiques dealer, looked over the check and dialed up a courier who was in a nearby coffee shop, to bring the document, unceremoniously stuffed into a plain cardboard box, up to the office. Pratt was well known to even amateur document enthusiasts for his appearances as an appraiser on the popular PBS feature "Antiques Roadshow."

The document was delivered to the meeting room. Steve Harmelin, a lawyer who represented the Constitution Center, along with one of the center's document experts, examined the parchment and summoned Wittman into the room. Everyone was surprised that any document appeared at the initial meeting. Playing the part to the hilt, Wittman spoke admiringly of how delighted he was to have such a treasure to mark the center's opening. It was the authentic Bill of Rights, right there on the table in front of him.

As the "buy" was about to take place, Wittman made sure he was in a position to block anyone from escaping or damaging the document. Harmelin made an excuse to leave the room and knocked on the door of the office where the FBI agents were ensconced. With that signal the other FBI agents stormed into the room. There were no shots and no arrests. The only thing taken into custody was the Bill of Rights. Back in Raleigh at the executive mansion, the intercom suddenly squawked: "Governor, Reuben Young on line three, Young on three." I ended the call I was on and picked up the phone. "Governor, we got it," Young said. "What, got what?" I asked. "The document, they brought the document and the FBI seized it right there on the spot."

"Naw," I replied. "You know they weren't crazy enough to bring it to the first meeting." Reuben confirmed: "Apparently so. But we still have a long way to go. The US Attorney's Office and Attorney General Cooper say this will take a while to get sorted out on the legal side." It seemed to me that it was our Bill of Rights. Nobody could dispute that! "It's not like there are 10,000 of these documents being sold on Ebay. They know it's ours so why don't they just give it to us?" Reuben calmly assured me that it would all work out and I would do well to show some patience.

With great fanfare, we all announced the successful sting the next day. News releases came from my office, the US Attorney's Office in Raleigh, and the FBI in Philadelphia. We all took credit and nobody seemed to mind. The television reports and newspaper headlines declared "Bill of Rights Recovered." Everyone involved will have their own special version of the success of that day. None of us had every detail for all the events, each of which was critical to the success. There was much celebration and plenty of well-deserved credit to go around. "North Carolina's stolen Bill of Rights has been out of state for nearly 140 years, but never out of mind," I said at the announcement of the successful recovery. "It is a historic document and its return is a historic occasion. I just want to make sure every North Carolina child has a chance to see it." Attorney General Roy Cooper echoed the creed that we had steadfastly adhered to since 1897. "North Carolinians should not have to pay a penny for what is rightfully ours. It'll be nice to put it back where it belongs." In Philadelphia, Gov. Rendell, FBI Agent Jeffrey Lampinski, and US Attorney Patrick Meehan posed for a photo-op with our Bill of Rights. But it was the US Attorney in North Carolina that was going to have to do the heavy lifting.

Legal Battles Continue

The dramatic events of that March day were not an end, but only another skirmish. Those who thought they had claim to our Bill of Rights fought it out in court to try to get some cash from their ill gotten booty.

But for Pratt and his partner Robert Matthews, other unrelated events would soon make their legal challenges for the Bill of Rights more difficult. Pratt, who had shops in Woodbury, Connecticut, and Nantucket, Massachusetts, was a bit more than the cheerful antiques dealer and history buff he seemed. Soon after the Bill of Rights was seized, he got into trouble with the federal government on tax charges connected with the purchase of a Washington, DC, condominium that belonged to former Republican Connecticut Gov. John G. Rowland. The related corruption scandal forced Rowland from office. Pratt pleaded guilty to the federal tax charges. In July 2007 Pratt, 64, died of complications following heart surgery. Matthews, a wealthy real estate developer, also was embroiled in the troubles of Gov. Rowland. He was a close friend of Rowland's and, according to news reports, had received millions in contracts from the Connecticut state government.

Initially both Pratt and Matthews challenged the government's action in seizing the Bill of Rights and North Carolina's claim of rightful ownership and even its authenticity. "Whatever the document is, and wherever it has been, its authenticity and ownership have yet to be established," said a prepared March 28, 2003, statement from Hugh Stevens and Amanda Martin, Raleigh lawyers who represented Pratt. "We and our client look forward to the resolution of these important questions." In September 2003 Pratt withdrew his claim and agreed to donate the Bill of Rights to the state. Matthews and his lawyer argued that the document was the spoils of war and North Carolina, by joining the Confederacy, could no longer claim ownership. The arguments never found favor in the courts.

Handwriting Deciphered

So, how to authenticate the document? North Carolina had an ace in the hole, our archivist George Stevenson. By April the Bill of Rights was in Raleigh, under federal custody. Stevenson is an expert in colonial and post-Revolutionary War documents and familiar with the handwriting at the time, particularly the script of key North Carolina figures of the day. It seems that both the letter from President Washington that accompanied the Bill of Rights and the Bill of Rights were endorsed by the same person. At the time, official documents usually were endorsed to mark the date of their official receipt. Stevenson noted that back in those days it would have been endorsed by either John Hunt, the principal clerk of the NC House of Commons, or Sherwood Haywood, the principal clerk of the state Senate. But, when he reviewed the Bill of Rights that first week of April, the handwriting did not match either. Stevenson went back to the archives and found an endorsement by a clerk on a 1794 copy of the 11th amendment to the US Constitution and another notation on a letter from Washington to Gov. Samuel Johnston. They were all the same. The handwriting belonged to Pleasant Henderson, who in 1789 was the engrossing clerk for the state House and had been private secretary to Alexander Martin (who served as governor from 1789 through 1792). Stevenson swore in an affidavit that it was Henderson who signed the Bill of Rights and was "without question the original copy of the Bill of Rights received by the state."

Victories in the Courtroom

By September 2003 Pratt decided his legal challenges to North Carolina's claim on our Bill of Rights were not worth continuing. He cut a deal with the feds and dropped his claim. But Matthews did not want any part of the deal. Through his lawyers, Matthews said he deserved a $15 million tax deduction for a charitable contribution. While Matthews continued to file legal actions to stake his claim, none found any traction. At one point two Raleigh lawyers representing Matthews came to meet with me. They wanted to know what the state wanted out of the matter. I told them, as far as I was concerned, I just wanted the Bill of Rights back for the state. If there was to be any further legal action, that was up to the US Attorney's Office and our attorney general.

Governor Mike Easley poses with North Carolina's original copy of the Bill of Rights. Photo courtesy NC Department of Cultural Resources.

On August 4, 2005, US District Judge Terrence W. Boyle put the case to rest. "The United States Marshal for the Eastern District of North Carolina, the present custodian of the document, is hereby ORDERED to return possession of the copy of the Bill of Rights to the state of North Carolina by immediately delivering it to the governor of North Carolina or his legal designee. Any other issues pending before the court are rendered moot." On June 22, 2006, the Fourth Circuit Court of Appeals upheld the order. But that was not the end, and legal challenges moved to the North Carolina courts. The legal cloud over ownership of North Carolina's copy of the Bill of Rights finally was lifted by state superior court judge Henry W. Hight Jr. on March 24, 2008, with an order of summary judgment. "North Carolina's original copy of the Bill of Rights is a public record of the state of North Carolina, that the state has never abandoned, conveyed, or in any way relinquished its ownership."

Finally, the Bill of Rights

For years we had fought, thought, and schemed to retrieve that document that we call the Bill of Rights. And I did it because it was ours, we were entitled to it, and it was my responsibility as governor. But the day in 2005 when the judge ordered that "it be returned by the court to the governor of North Carolina immediately" was special. I was in Raleigh at the executive mansion and received a call that US Attorney Frank Whitney was bringing me the Bill of Rights. We met at the state Capitol from which it was stolen 140 years prior. My son was visiting from college. I fetched him, state Senate President Pro Tempore Marc Basnight of Manteo, and the state's Speaker of the House of Representatives, to accept the document with me. As the FBI agents uncovered the document it reminded me, more vividly than ever, how precious these rights are. My eyes washed over the calligraphy, the elaborate pen and ink work, and I began to read "The right of the people to be secure in their persons, houses, papers, and effects. ..." I was humbled by thoughts of how many had sacrificed so much, at home and abroad, to guarantee these unusually broad freedoms. I thought about the courage it took to guarantee these rights in unpopular causes, the judges, lawyers, soldiers, and ordinary citizens, so many who had suffered ridicule in defense of these rights. Then I reached slowly and touched it, the same Bill of Rights that George Washington touched. I was filled with a sense of pride and patriotism. I was momentarily motionless. "Governor, please,

State Archivist Dick Lankford smiles in the background as young and old alike enjoy a glimpse of North Carolina's original copy of the Bill of Rights.

the acid from your finger is bad for the document," an agent admonished me, as he placed it in a special case for display. As we walked with the Bill of Rights into the old Senate Chamber in the historic Capitol, where the news media had been hurriedly assembled, I thought: "This is special. Everybody should be able to see this and think about what it means."

"Every Child has a Chance to See It"

If rock stars and Broadway shows can go on the road, why not North Carolina's copy of the Bill of Rights? We did not go through an elaborate sting and all of this legal wrangling to have this cornerstone of our history, our liberty, gathering dust in a hermetically sealed archival shelf. Let's put the Bill of Rights on tour. And that is what we did. In 2007 the Bill of Rights hit the road for a tour of seven North Carolina cities. The state Department of Cultural Resources prepared lesson plans to enhance the experience for school children and also produced a special DVD for classroom use.

The document traveled with the tightest security, accompanied by officers of the Highway Patrol. Each location of the tour was selected to highlight the freedoms the Bill of Rights guaranteed and thousands turned out to see this wonderful document. At each site, the display was accompanied by a lecture highlighting certain aspects of the Bill of Rights.

- Wilmington, home of the state's and one of the nation's oldest synagogues, to highlight freedom of religion.
- Fayetteville, displayed in the 82nd Airborne Museum, a location that was once the site of the *Fayetteville Observer*, North Carolina's oldest continually published daily newspaper (freedom of the press).
- Edenton, displayed in North Carolina's oldest courthouse and where, on October 25, 1774, Penelope Barker organized the Edenton Tea Party, one of the earliest organized women's political actions in United States history. At the home of Elizabeth King, 51 women protested "taxation without representation" (freedom of speech).
- Greensboro, near the site of the historic battle of Guilford Courthouse (the right to bear arms).
- Charlotte, where on May 31, 1775, the Mecklenburg Resolves declared independence from Britain and allegiance to the Continental Congress (the rights to assemble and petition the government).
- Asheville, at the UNC-Asheville campus where former Supreme Court Justice Willis Whichard talked about the right to a jury trial and due process.
- Raleigh, displayed at the state History Museum where former US Solicitor General Walter Dellinger wrapped up the tour with a discussion of the Ninth Amendment, the non-enumerated rights.

The parchment document, about 31-3/8 inches by 26-1/2 inches, is fragile. After we recovered it, the Department of Cultural Resources had it professionally conserved. Today it resides in the state archives in our capital city, where it was sent in 1789 by President Washington. Then, as now, the intent was to display the Bill of Rights to be reviewed by the people of North Carolina. Today we still are conducting a great experiment in democracy that continues to evolve and energize our citizens. We were aggressive in bringing these rights back to North Carolina. We must be equally vigilant to insure that these rights are a genuine part of the life of every citizen.

Acknowledgements

I express my thanks and appreciation to the following for their efforts in retrieving North Carolina's Bill of Rights and whose research and recollections contributed to this article:

The staff of the National Constitution Center, without whose initial action the retrieval would not have been possible, particularly CEO Joseph Torsella, Executive Vice-President Laura Linton, lawyer Stephen Harmelin and Pennsylvania Gov. Ed Rendell; Reuben Young, Andy Vanore, and Hampton Dellinger of my legal staff; Attorney General Roy Cooper, Chief Deputy Attorney General Grayson Kelley, Special Deputy Attorney General Dale Talbert, Assistant Attorney General Karen Blum, and former Chief Deputy Attorney General Eddie Speas of the NC Department of Justice; Deputy Cultural Resources Secretaries Pam Young and Staci Meyer, Deputy Secretary of Archives and History Jeffrey Crow, David Olson, archivist George Stevenson, and archivist Catherine Morris; US Attorneys Frank D. Whitney, Patrick Meehan, and Bobby Higdon; FBI agents Jeffery Lampinski, Robert Wittman, Chris Swecker, and Paul Minella; and US Marshal Charles Reavis. ■

Mike Easley was elected to two terms as North Carolina Governor, serving from 2001 through 2008. Prior to that he was the state's attorney general from 1993 through 2000. Easley was elected district attorney for the 13th Judicial District in Brunswick, Bladen, and Columbus Counties in 1982. He received his law degree from the North Carolina Central School of Law in 1975 and a bachelor's degree in political science from the University of North Carolina in 1972. He was born and raised in Nash County.

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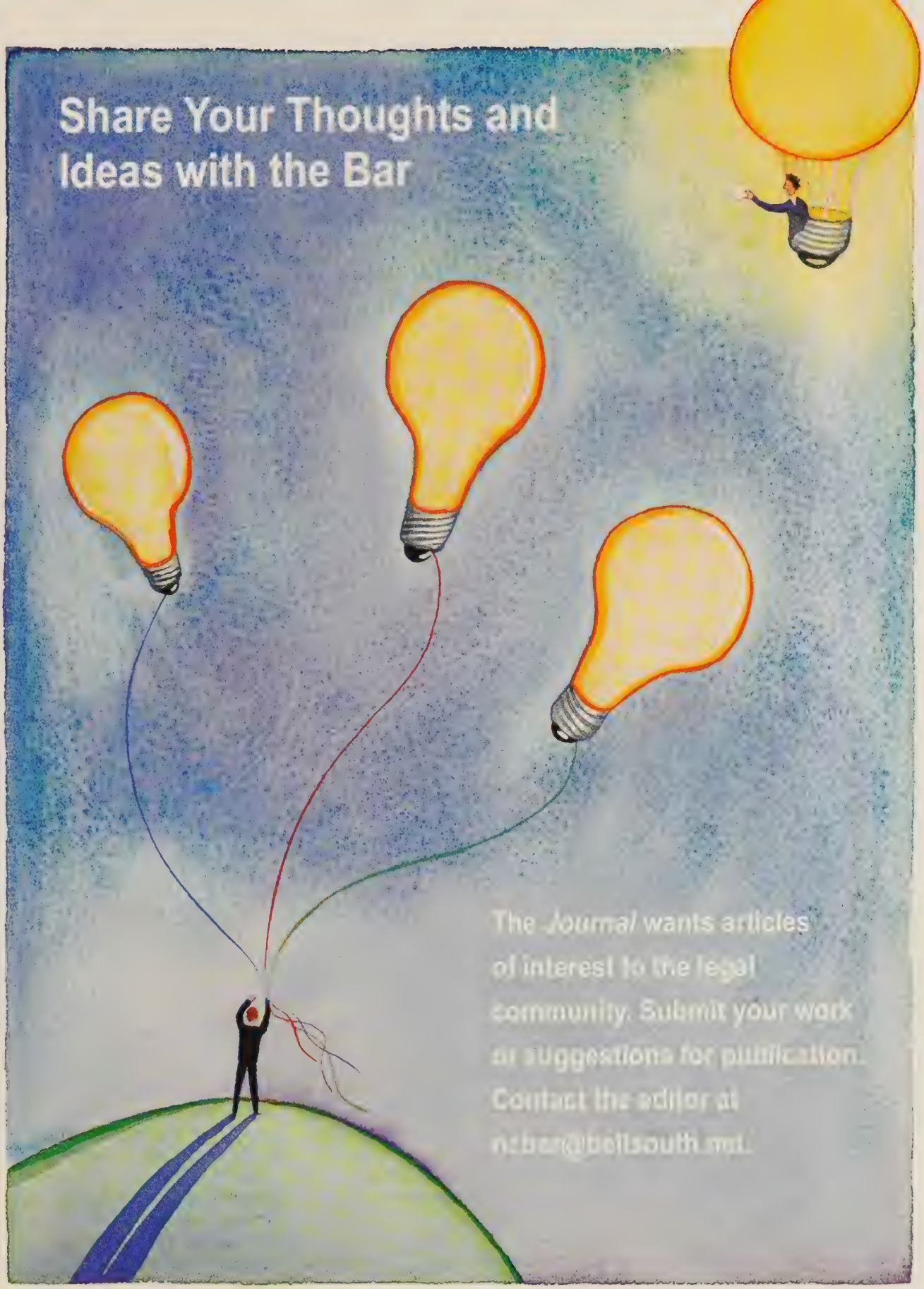

The *Journal* wants articles of interest to the legal community. Submit your work or suggestions for publication. Contact the editor at [redacted]

Reclaiming Our Roots—

Understanding Law as a "Learned Profession" and "High Calling"

By Carl Horn III

As Bob Dylan crooned—or as one of our kids irreverently described it, "croaked"—in the sixties, "the times they are a-changin'." Or, more accurately, they have "a-changed."

When I graduated from law school in 1976, I joined what was then considered one of Charlotte's four "large firms," known at the time as Grier Parker (now as Parker Poe). With my addition, we were 17 in number, 14 of whom were partners. William Rikard had just finished his fourth year and made partner; Billy Farthing, Hank Hankins, and I were the three associates.

There were only three other firms in Charlotte in 1976 with more than 15 lawyers; most of our colleagues were practicing in firms numbering four or less.

We now swear in hundreds of lawyers in Charlotte each year—more new lawyers annually than there were in the entire Mecklenburg County Bar when my father graduated from Duke Law School and began practicing in the late 1940s. There are now over 4,000 lawyers in Mecklenburg County, at least five Charlotte-based firms now have more than 100 lawyers, and there are an increasing number of large regional or national firms with a substantial local presence.

In my father's day and continuing into the '60s, most lawyers in Charlotte had their offices in a single place—the Law Building (which, with a touch of irony, was torn down to make room for an expanded jail). In those days the lawyers in Charlotte not only knew each other, but many were close personal friends. Today, it is safe to say that it is the rare lawyer who would recognize the face or even the written name of 10% of their theoretical brothers and sisters at the bar. Indeed, a Charlotte lawyer who is a partner in a truly large firm confided in me several years ago that he regularly encounters lawyers he doesn't know *in his own firm.* He recognizes them only because they have the same firm identification card necessary to operate the elevator.

For decades and well into the '80s, lawyers in Charlotte and elsewhere somehow found time for busy and thriving practices and for seemingly limitless public

service. For example, the 16 lawyers ahead of me at Grier Parker collectively served as chairmen of the boards of Queens College, the Charlotte YMCA, our Symphony Orchestra, Opera, and Arts & Science Council, and as chairmen of the county Democratic and Republican parties. One served for a time as one of the highest ranking laymen in the Presbyterian Church, another as president of his synagogue. Two served as chairmen of the Charlotte-Mecklenburg Board of Education.

The times *have* changed, particularly in large firm practice in more urban areas like Charlotte—and these are realities we have to take into account as we think about the lack of satisfaction a significant percentage of lawyers have reported in polls and surveys beginning in the 1980s.

I hope most of you deep down are proud to be lawyers, that you have a sense of being part of a profession with a storied past, and notwithstanding all the lawyer jokes and bashing, a profession which continues to play a crucial role in our relatively free and orderly society. But I also assume it doesn't hurt to be reminded of our notable heritage from time to time.

Professor Carl T. Bogus, who practiced law in Philadelphia before entering academia, accurately summarized our professional roots in a 1996 article which he titled—we hope *inaccurately*—"The Death of an Honorable Profession." Quoting Professor Bogus:

> [L]awyers enjoyed a special status from the very beginning of the Republic. Twenty-five of the 52 men who signed the Declaration of Independence were lawyers. Many highly regarded—even revered—figures were lawyers, among them [Thomas] Jefferson, [Alexander] Hamilton, [John] Marshall, John Adams, and Daniel Webster. From 1790 to 1930, two-thirds of all US senators and roughly half of all members of the House of Representatives were lawyers; since 1937, lawyers have made up between half and three-quarters of the Senate, more than half of the House, and more than 70% of all presidents, vice-presidents, and members of the cabinet.

Even our vocal critics often concede the immense contribution lawyers have made historically. For example, there is Professor Deborah Rhode who directs the Stanford Law School Center on Legal Ethics and the Legal Profession, is a past-president of the Association of American Law Schools and former chair of the ABA's Commission on Women in the Profession. An unapologetic advocate of radical reform, Professor Rhode tempers her criticism of contemporary practice by conceding what she calls "a broader truth," namely that "[l]awyers have been architects of a governmental structure that is a model for much of the world [and have been] leaders in virtually all major movements for social justice in the nation's history." And of course there are the countless contributions lawyers have made—and continue to make—providing critical assistance to individuals, businesses, and non-profit organizations, serving in local and state government, and generally enriching communities across the nation and around the world.

On the other hand, the critics are partly right: all is not well with the contemporary practice. For several decades now, surveys and studies have shown that a substantial percentage of lawyers are at least somewhat dissatisfied professionally, that a lesser number are downright miserable, and that public respect for our profession has significantly fallen since the '50s and '60s—when the typical view of lawyers was not inconsistent with the portrayal of Atticus Finch in *To Kill A Mockingbird*.

In sharp contrast, according to a *National Law Journal*-West Publishing Company poll, by 1993 almost a third of the public believed lawyers were "less honest than most people," and an ABA poll conducted the same year found that only one in five Americans considered lawyers to be "honest and ethical." Although we can take issue with the accuracy of these subjective beliefs—and we should—we cannot disregard the fact that this is how we are regarded by many outsiders looking in.

The survey data on lawyer satisfaction is also troubling. "Miserable with the legal life" was how a front-page *Los Angeles Times* article described many California lawyers in 1995. The article reported that 25% of the lawyers in that state were then on inactive status. The next year, 3,000 miles away in Boston, the Women's Bar Association of Massachusetts chose "The Misery Factor" as the theme for their annual meeting.

The *Times* article and the Boston meeting were preceded by ABA surveys in 1984 and 1990 which found a *20% drop*—during those six years alone—in the number of lawyers describing themselves as "very satisfied" professionally. In the 1990 survey, those reporting that they were "very dissatisfied" included *22%* of all male partners and *43%* of all female partners.

The ABA data was supported by research at Johns Hopkins University, also reported in 1990, which examined the prevalence of "major depressive disorder" in 104 different occupations (including the major professions). The research found only five of the 104 occupations in which the occurrence of major depression exceeded ten percent—and lawyers topped even this list, suffering from major depression at a rate 3.6 times higher than nonlawyers with the same sociodemographic traits.

An extensive survey conducted in 1989 by our State Bar Association, prompted in part by the tragic suicides of eight Mecklenburg County lawyers in a seven year period, similarly found that one in four North Carolina lawyers were then struggling with serious depression. Some of you may have known well a highly-regarded Charlotte lawyer who only recently took his life.

Reading the ABA's monthly e-magazine, which includes a blog, suggests that not much has changed in the interim. Recent articles and comments have featured firms that have rescinded offers or reduced staff, and lawyers who have left the traditional practice to go in various directions—including the lawyer who made a YouTube video of burning his Harvard Law School diploma. He was opting for "a simpler life," he said.

What happened? How did our learned profession, embraced for generations as a "calling" and found to be profoundly satisfying by most who entered it, come to be dissatisfying and even depressing to many contemporary practitioners? And how did the esteem in which the legal profession has traditionally been held sink to the point that only one in five Americans believes the typical lawyer is honest and ethical?

Are the roots of the answer to be found, ironically, in our unparalleled *success*—at least, our financial success? As legal fees soared and partners enjoyed unprecedented profits in the 1970s and 1980s, could it

We take a major step in the right direction if we simply commit to applying the Golden Rule in our professional lives: treating others—including our clients, opposing counsel, and their clients—as we ourselves wish to be treated. It perhaps goes without saying that this implies civility, honesty, and unimpeachable ethics, including scrupulous honesty in our billing practices.

be that lawyers in increasing numbers lost sight of the law as a calling and began to see it more as a highly profitable business? Was that not also the point when associate salaries rose sharply—as did ever higher billable hours requirements—making a balanced life far more difficult?

The first scholarly book to address these issues was Yale Law School Dean Anthony Kronman's *The Lost Lawyer: Failing Ideals of the Legal Profession*, published by Harvard University Press in 1993. In words usually reserved for the pulpit, Dean Kronman pronounced that what we are facing is a "spiritual crisis" in which "the profession now stands in danger of losing its soul."

What is of such great concern to the dean of Yale Law School that he would choose religious language to describe it; and to Ambassador Sol Linowitz, the late Wall Street lawyer, chairman of Xerox Corporation, and author of *The Betrayed Profession*; and to lawyer/psychotherapist Benjamin Sells, author of *The Soul of the Law*, and to Harvard Law Professor Mary Ann Glendon, who had similarly bold words for our profession in her 1994 book, *A Nation of Lawyers*?

In one way or another, at the heart of the concerns expressed by these accomplished commentators is the devolution of our understanding of law as an honorable profession—as a "high calling"—into little more than a pragmatic, dollar-driven business.

To escape naivete, or worse, I offer three caveats at this point. First, there is a big difference between practicing law in a business-like manner—which is commendable—and allowing money-making to become our overwhelmingly dominant motivation, which is the intended target of the more persuasive criticism. Second, in a day when overhead in some firms exceeds 50%, when many clients are demanding almost immediate responses and at reduced rates, and lawyers and clients readily move from firm to firm, tough business—and balance—decisions are inevitable. And third, however much we embrace law as a calling or as a grand opportunity for public service, it is also hard and challenging work; in fact, anyone who enters the profession expecting a predictable 40-hour work week and consistently high income is unrealistic and probably destined for disappointment.

But with those caveats, Dean Kronman is on the mark when he exhorts the profession to return to what he calls an "older set of values." And at the heart of this "older set of values" was an *assumption* that the best lawyer was "not simply an accomplished technician but a person of prudence and practical wisdom as well...a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess."

This is certainly the tradition to which the great lawyers of yesteryear adhered. Consider the refreshingly straightforward advice the great Elihu Root gave one of his clients. "The law lets you do it," he counseled, "but don't.... It's a rotten thing to do." In fact, Elihu Root, a prominent New York lawyer who received a Nobel Prize for his service as Theodore Roosevelt's Secretary of State, once opined that: "About half the practice of a decent lawyer consists in telling would-be clients they are damned fools and should stop."

Although I discuss the subject more systematically in my book, I would like to briefly mention a few of the steps we as individuals and as a profession can and should be taking. I package them in *LawyerLife*, somewhat tongue in cheek, as "the world's first 12-step program for lawyers."

The first ingredient toward healing is to assess candidly where we are (individually and as a profession) and to agree on where it is we want to go. As the Proverb instructs, "Where there is no vision, the people perish." The same is true of a profession.

Hopefully we will agree with Dean Kronman that what he calls "an older set of values" should be reinvigorated, including the pursuit of "wisdom about human beings and their tangled affairs." *Wisdom!* And while we're at it, can we agree that we should care, as individuals and as a profession, more about *justice* and *truth* than about winning at any cost or maximizing our bottom lines?

Next let us ask ourselves what we individually and collectively *value*, or to use a more old-fashioned "v word," what we consider *virtuous*. Those who are charitable with their time and resources, perhaps? Those who are passionate about a cause and sacrifice to advance it? Those who transcend narrow self interest, reaching out helping hands or giving in a meaningful way to those who are less fortunate? And of course let us never lose sight of the central importance of making the nurture of our families and close friendships a clear, and life-long, priority.

Sometimes we need a wake-up call before we understand the importance of this last point. I recall a conversation in chambers with Keith Tart, then a partner in a large North Carolina firm who had a national toxic torts practice and had been admitted *pro hac vice* in over 30 state and federal courts—so you can imagine how much time he was spending at home. Keith told me that he got his wake-up call when his first-grade daughter was asked in school to draw a picture of her family. He wasn't in the picture! The family dog was, but he wasn't.

We take a major step in the right direction if we simply commit to applying the Golden Rule in our professional lives: treating others—including our clients, opposing counsel, and their clients—as we ourselves wish to be treated. It perhaps goes without saying that this implies civility, honesty, and unimpeachable ethics, including scrupulous honesty in our billing practices.

Lawyers in search of balanced excellence

should give special attention to emotional balance, that is, to balance between the rational/cognitive left-brain elements of human experience—where many lawyers are at their best—and the "softer" right-brain elements, including feelings, imagination, and what we collectively refer to as "heart." Lawyer-turned-psychotherapist Benjamin Sells makes this point very effectively in his book, *The Soul of the Law*, attributing the loneliness and depression experienced by many of his lawyer patients primarily to the absence of emotional balance and health.

There are also a number of more pragmatic steps we can take to make our professional lives more fulfilling. Among these would be practicing good time management; implementing healthy lifestyle practices, including regular exercise; watching our consumer spending, living beneath our means; resisting the push of technology to control our lives 24/7; and being more circumspect about which clients we agree to represent. For more of my thoughts on these and other "steps" you will have to read *LawyerLife*.

Which brings me to my last suggestion: avail yourselves of the growing literature expounding on these themes. Several years ago a group of us put together an annotated bibliography for the ABA's Commission on Lawyer Assistance Programs (send me an e-mail at Carl_Horn@ncwd.uscourts.gov and I'll mail you a copy). I suggest that you start with Steven Keeva's inspiring book, *Transforming Practices: Finding Joy and Satisfaction in the Legal Life*. Keeva, a non-lawyer legal journalist, draws the reader in with compelling anecdotal stories about lawyers from a variety of backgrounds who have found the kind of professional and personal equilibrium for which we should each strive. *Transforming Practices* is one of those rare books that both stimulates the mind and warms the heart.

One hundred and eighty years ago Justice Joseph Story penned his often quoted observation that "the law is a jealous mistress." The remainder of his reflection, which points to the focused passion which is required if we are to renew our profession, is less well-known. Included in an article published in 1829 and titled "The Value and Importance of Legal Studies," Justice Story wrote:

> [The Law] is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage.

In other words, as we lawyers pursue "balanced excellence," aware of those on whose shoulders we stand, a key component must be that our priorities and actions unequivocally show that we love the profession we have chosen. My hope and prayer is that we, individually and collectively, are up to the task. ■

Carl Horn III served as US Magistrate Judge for the Western District of North Carolina from 1993 until April 2009 and as chief assistant US Attorney for six years preceding his appointment to the bench. He is the author of numerous books and articles, including LawyerLife *(ABA Publishing 2003), and is a frequent speaker at bar functions on the issues addressed in this article.*

NC IOLTA Celebrates Its 25th Anniversary

By Clifton Barnes

Throughout 2009, we will be celebrating the 25th anniversary of the Plan for Interest on Lawyers Trust Accounts—more popularly known as NC IOLTA. Established in 1983, the program was implemented during 1984. In celebration, the Journal *will publish a three-part series on NC IOLTA during 2009. This first article focuses on the program's establishment and its exceptional leadership throughout its history. Future articles will discuss the ups and downs of IOLTA income over the years and highlight some of the program's grantmaking.*

Having graduated from law school 70 years ago, respected North Carolina attorney Bill Womble Sr. admittedly doesn't remember everything about his career. But he does recall a good deal about his involvement with the IOLTA program.

NC IOLTA trustees and staff members proudly accepted the award for Outstanding Philanthropic Organization of 2005. (Left to right) James M. Talley Jr., 2005-06 chair of the IOLTA Board; Claire Mills, accounts manager; Evelyn Pursley, executive director; Sonja Puryear, administrative assistant; Michael C. Miller; and Marion A. Cowell.

The NC Interest on Lawyers' Trust Accounts program is celebrating its 25th anniversary throughout 2009 and many of those trustees who have been involved seem to remember a lot about their service, in part, because of the importance they place on IOLTA.

"I think all of us enjoyed working together on the board," said Womble, who served on the initial board. "We felt we were working for a good, worthwhile cause—of benefit to the public, the administration of justice, and our calling as lawyers."

In 1983, the North Carolina State Bar Council approved formation of the voluntary program and the NC Supreme Court approved changes to the Code of Professional Responsibility allowing IOLTA accounts. While there was hesitancy among some, including Womble, the program has enjoyed support from the legal community from the very beginning.

By April of 1984, when the NC program was officially implemented, the NC Bar Association, the NC Academy of Trial Lawyers, the NC Association of Women Attorneys, the NC Association of Black Lawyers, and Legal Services of North Carolina had all enthusiastically endorsed IOLTA.

The idea is for interest income generated from lawyers' pooled trust accounts to be used to fund grants to providers of civil legal services for the indigent and to programs that further the administration of justice.

Womble said that he was volunteering with the American Bar Association when he first heard about the concept of IOLTA. "My initial reaction was that since lawyers' trust funds were clients' money, any interest earned belonged to the client for whom the money was held," he said. "However, as I learned more about it, I was satisfied that the idea was a good one."

He said it didn't make practical sense to try to account to each client the interest earned from miscellaneous, short-term funds.

And since it wasn't the lawyer's money, the lawyer was not entitled to the interest. "Furthermore, if interest could be earned, it would be better to use the interest for a worthwhile, law-related cause than to have the bank in which the money was deposited benefit from it," Womble said.

As a result, the NC IOLTA program has awarded over $55 million in grants to worthy programs over the last 25 years.

Tom Lunsford, the executive director of the North Carolina State Bar, said that he attends law-related meetings throughout the country and he often hears flattering references to North Carolina's IOLTA program.

"I believe our program is simply much better than average," Lunsford said. "It has historically raised a disproportionately large amount of money while keeping its own expenses extremely low. And it has managed to do a tremendous amount of good in the process."

"Those of us on the original board were intent on establishing sound policies and procedures," Womble said. "We wanted to ensure that all funds would be properly handled and accounted for, that all grants would be to responsible organizations, that grants would be applied for appropriate purposes, and that overhead would be kept as low as reasonably possible."

Womble said the original board of trustees had a general goal of keeping overhead under 10% so that 90% could be used for grants. That goal holds today as more than 90% of IOLTA income is available for funding. IOLTA income still pays for the operating expenses and still no funds from State Bar dues are used to support the program.

That stewardship from the nine-member board, which is appointed by the State Bar Council, resulted in the NC IOLTA program becoming the nation's largest non-mandatory program—that is, until North Carolina moved to a mandatory program itself by order of the NC Supreme Court in 2008. While a voluntary program, 75% of eligible North Carolina attorneys participated. As a result of becoming mandatory, generated income and grant money are expected to rise considerably beginning this year.

The program has certainly come a long way since State Bar staff attorney David Johnson first helped set up the program and became the first executive director.

"I spent considerable time traveling to local bar meetings and explaining the program," Johnson said. "I also attended the annual meetings of the Bar Association and the Academy as a 'vendor' with a station to meet with attorneys one on one."

In May of 1984, Bobby James, then executive director of the State Bar, hired Martha Lowrance to market the new program. She developed the logo and formed a working relationship with the Young Lawyers Division of the NC Bar Association.

"I worked with the Young Lawyers Division in the larger cities and got them to market the program to the law firms and to financial institutions," Lowrance said. "We were successful with this plan in some of the larger cities."

Lowrance and her volunteers had to overcome misperceptions, including the fear that those who participated in IOLTA would be subject to more audits by the State Bar. In addition, Lowrance said, they had to overcome the problem that attorneys associated IOLTA with the Client Security Fund.

"They thought if they signed up for the IOLTA program they would somehow be involved with the Client Security Fund, which was unpopular," Lowrance said.

Though there were many questions, and although IOLTA programs were new throughout the country, Johnson said he doesn't remember ever considering the possibility of failure. "We simply kept promoting the program whenever there was an opportunity," he said. "We publicized participation by both the banks and attorneys in hopes that they would receive recognition and those who had concerns would see that there were those who had overcome those concerns."

While some of the concerns could be attributed to a general resistance to change and some attributed to a principled objection that the state was "taking" client property, many of the concerns were practical.

"One legitimate concern for lawyers was whether the IRS would deem their clients to have constructively received the interest generated by the account," Johnson said. The

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Brenda B. Becton	2005-2011
Linda M. McGee	2008-2011

IRS, however, issued a revenue ruling that they would not require clients to recognize income "through constructive receipt" for interest generated by an IOLTA program.

"We sought and received a private letter ruling from the IRS that the North Carolina IOLTA program qualified under that revenue ruling," Johnson said.

Once the program was on good footing, Johnson returned to his staff attorney duties in 1985, but he remembers his time as executive director fondly. "I felt privileged to work with some of the best lawyers in the state who served on the board."

Four members of the original board of trustees are now deceased—James P. Crews, Clifton W. Everett Sr., Beverly C. Moore Sr., and Naomi E. Morris. Others on the first board were Womble, Robinson O. Everett, Jeff D. Batts, C. Woodrow Teague, and Charles L. Becton.

"I recall being pleasantly surprised by the unanimity of commitment and sensitivity to the needs of the less fortunate demonstrated by members of the initial board of trustees," Becton said. "I, of course, was honored that I had been asked to serve. I viewed service on the board as an opportunity—the best opportunity—to provide equal access to the courts for deserving litigants who would not otherwise have been able to afford a lawyer, and to help fund worthy recipients in their *pro bono* or public service efforts."

While he is most proud of the grants that the board made, there's something else that comes to mind when he thinks of IOLTA. "I am pleased that I had the opportunity to renew, in some instances, and create, in other instances, very good and lasting professional friendships with giants in our profession."

In addition, Becton, who served from 1983-1991, has a close continuing interest in the happenings of the IOLTA Board of Trustees through good friends Geraldine Sumter and Clifton E. Johnson, who served on the board in the 1990s, and through his wife Brenda, who currently serves on the board.

The board now consists of two past presidents of the NC State Bar, two past presidents of the NC Bar Association, a judge on the NC Court of Appeals, a former general counsel to one of the largest banks in the state, and a former president of the North Carolina Bankers Association.

"They are as fine a group of dedicated people with whom I have ever served on any board or committee," said Robert F. Baker of Durham, one of the former presidents of the NC Bar Association who serves on the board. "All of these members are dedicated to the work of IOLTA and very regular in attendance at board meetings."

In making appointments to the board, the State Bar Council looks for diversity, including size of firm, geography, gender, and race. "We also try to have judicial experience," said Evelyn Pursley, who has served as executive director since 1997. "We have been blessed by having trustees who have had significant experience as bar leaders."

In addition, Pursley said that IOLTA has benefited greatly from having trustees with ties to the banking industry. "They help us understand how to talk to the banks when we need to work with them regarding administrative matters or to encourage them to improve the policies provided on IOLTA accounts," she said.

Pursley said the board has lively discussions. "I appreciate that because it means that they are truly engaged and care about the program," she said. "There is also a lot of good fellowship; they enjoy each other's company."

There is also a fair amount of good-natured ribbing. Jim Talley, who served on the board from 2002-2008, said he was a main proponent of getting his friend Larry McDevitt of Asheville on the board to help balance the geography. "Having gotten McDevitt on there, sometimes it was a challenge to deal with his thought processes," Talley said with a laugh. "When I left the board, not only did I get this wonderful certificate for my work, McDevitt also had another certificate made up that said, 'Good Riddance.'"

Talley said the great thing about the board is that the trustees have a sense of commitment but at the same time approach the work with a great deal of personality. "These are private meetings and hardly anything ever leaves the meeting, so there is great dialogue," he said. "It's a wonderful mixture of people who over time become a very cohesive group."

He particularly points to Baker, McDevitt, and Marion Cowell as trustees who have a great sense of humor. "They're getting old enough now that they open up and say about anything they want to," he said.

Three trustees are appointed by the State Bar Council each July to staggered three-year terms and are entitled to serve a second three-year term. The council also selects a chairperson and a vice-chairperson for one-year terms. By rule, at least six of the nine trustees must be licensed North Carolina attorneys in good standing,

IOLTA Timeline

January 1983 — The North Carolina State Bar Council approves a proposal for a voluntary IOLTA program.

July 1983 — Original IOLTA Board of Trustees is appointed by the NC State Bar.

July 1985 — First IOLTA grants are awarded in the amount of $200,000.

1987-88 — 1987 income and 1988 grants surpass $1million.

1983

June 1983 — NC Supreme Court approves changes in Code of Professional Responsibility allowing IOLTA accounts.

1984 — NC becomes 15th state to implement IOLTA program. NC Bar Association, NC Academy of Trial Lawyers, NC Association of Women Attorneys, NC Association of Black Lawyers and Legal Services of NC endorse IOLTA.

1987 — IOLTA Board establishes summer public service internship program for North Carolina Law Schools.

1991 — IOLTA Board adopts funding formula to encourage development of Volunteer Lawyer Programs across the state.

though to date all trustees have been attorneys. As the current State Bar President, John McMillan puts it, "the IOLTA Board is composed of the best people the State Bar can find."

"I believe the affiliation between IOLTA and the State Bar makes a lot of sense and has heightened the effectiveness of the program," Lunsford said. "The connection has engendered significant administrative efficiencies. It has also enabled the profession as a whole to respond to a chronic social problem in a meaningful and coherent fashion."

As a program of the one professional organization to which all lawyers must belong, Lunsford said, IOLTA has been a "mighty expression of our collective responsibility" to increase access to justice.

In fact, Marion Cowell, who leaves the board this year after two terms, said that's what he'll remember most. "My fondest memory is in seeing what we are doing for legal services and related activities that benefit those who need legal services and cannot pay for it," he said. "Also, I'll remember helping law students intern

June 1993 — The North Carolina IOLTA Program celebrates its ten-year anniversary and Governor Hunt proclaims week of June 21, 1993, as "IOLTA Appreciation Week."

October 1994 — The NC Sate Bar asks NC IOLTA to administer the state funding for legal aid that passes through the State Bar.

August 2007 — NC State Bar Council petitions the NC Supreme Court to enter an order directing the State Bar to implement a comprehensive or mandatory IOLTA program.

March 2008 — Court approves rule revisions to administer mandatory program. All IOLTA rules are moved to Chapter 1 Subchapter D of the Rules and Regulations of the NC State Bar.

2008

December 1995 — NC IOLTA Trustees establish a reserve fund to stabilize grants in times of income decreases (used for the first and, so far, only time to supplement 2005 grants).

2005 — NC IOLTA named Outstanding Philanthropic Organization for 2005 by Association of Fundraising Professionals.

October 2007 — The NC Supreme Court issues order to State Bar to implement mandatory IOLTA program - all active NC attorneys maintaining general trust accounts in NC must establish accounts as interesting bearing IOLTA accounts. The order is effective January 1, 2008.

2008 — IOLTA fully implementing a mandatory program with an annual certification requirement tied to payment of NC State Bar dues by June 30. Over 3,000 IOLTA accounts added, 2008 income surpasses $5 million.

in public service areas during their summers."

Talley, who now serves as IOLTA liaison to the NC Equal Access to Justice Commission, said when his term on the IOLTA Board of Trustees ended, he left with a good feeling that they have served an element of the state which would not otherwise be served.

He said that when the program was voluntary, the board members used to make direct contact with their colleagues who were in firms that were not members of IOLTA. "Every time I did that, I pointed out specifically what services were being funded in their community by IOLTA," Talley said. "Any time a lawyer asked why should I be doing that, they could see what those grants do and who they help in their area."

While the board did ample legwork, Talley credits the IOLTA staff. "The staff of the IOLTA program is magnificent," he said. "The dedication they have to their work and the leadership of Evelyn helps the IOLTA Board stay on the ball with what's going on."

Lunsford agrees and said that the 25th anniversary is a good time to pay tribute to those who work with the IOLTA program. "I believe that the lawyers and the people of North Carolina owe the IOLTA Trustees and Evelyn Pursley and her staff a debt of gratitude for their outstanding work on behalf of the legal profession and in support of fellow citizens who, in the absence of IOLTA, might not be able to obtain legal representation," he said.

Pursley heads the staff, which also consists of Claire Mills, accounts manager, and Sonja Puryear, administrative assistant. Pam Smith, a former employee (2000-03), rejoined the program as a part-time administrative assistant in February. Pursley believes, "Staff longevity also benefits the program." All current staff have been with the program for over ten years (as was previous director Martha Lowrance). Says Pursley, "Every member of the IOLTA staff really identifies with the program and believes in what we do. I sometimes hear Claire and Sonja talking on the phone with attorneys and bank staff. They often talk to them about how important IOLTA funds are for the state of North Carolina."

Pursley said that the trustees spend a good deal of time keeping up-to-date on issues involving legal aid, access to justice, and the banking industry.

"They work very hard—particularly at grant-making time when they review dozens of grant applications," Pursley said. "I am amazed by the time that our trustees, all of whom are busy people, spend on IOLTA matters. Service on this board is certainly not a 'resume line.'"

Lowrance, who served as executive director of IOLTA from 1985-1995 and who like so many others worked long hours, summed up her experience in a way that seems universal among those associated with IOLTA. "I loved doing it because I knew I was making a difference in the lives of poor people in my state." ■

Clifton Barnes, who majored in journalism and political science at UNC-Chapel Hill, served as director of communications of the North Carolina Bar Association from 1987-2002. He now runs his own writing, editing, and web development business named cb3media.com.

What IOLTA Has Meant to Me

By Ryan Connelly

Due to the generosity of IOLTA, I spent last summer interning at the Wake County Public Defender's Office. Fresh out of my first year of law school at UNC, I was eager to put my newly acquired legal knowledge to use and gain practical experience in the courtroom. Yet taking an unpaid position in a government office was financially impossible for my wife and me, being full-time students who require a summer income to supplement our student loans. The grant I received from IOLTA enabled me to work in the public defender's office without being burdened by an additional summer job.

My summer position was unique in that the attorneys gave me both responsibility to interact with clients and freedom to learn about the inner workings of each aspect of the criminal justice system. They were consistently available to answer my questions and willing to guide me through any task I was not equipped to undertake on my own.

Throughout the summer I helped manage cases in district and superior court, interviewed clients and police officers, examined criminal records, performed legal research, and even negotiated plea arrangements with prosecutors. The majority of my time was spent in the courthouse, and I was able to engage with a wide variety of criminal defense procedures. The hands-on experience and learning I gained in Wake County enabled me to connect the abstract ideas I learned in my first year of law school to tangible realities.

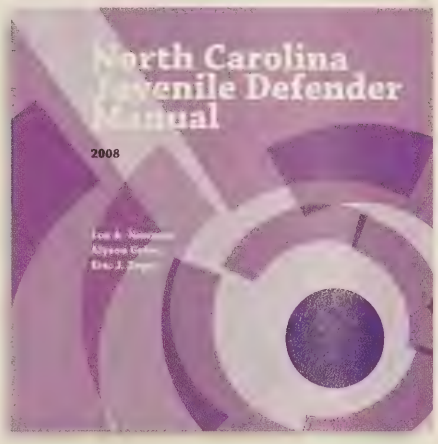
More meaningful, however, was the fact that I was exposed to the pressing need for access to competent legal services, regardless of income, and this will undoubtedly affect the decisions I make throughout the course of my career. I think specifically of a man I met this summer; I will call him James. James had his license revoked for an unpaid traffic ticket. However, the traffic ticket was on his record because someone had stolen his identity, created a false ID, and was charged with a traffic violation under his name. James needed to drive to work to support his wife and three kids, yet under these circumstances, he would likely lose his job. I was able to work with other lawyers on his case to prove that James was innocent and enable him to keep his license and his job. Though this was only a minor task, our efforts had an enormous effect on the lives of James and his family. In my future career, albeit in the public or private sector, I will be inclined to support legislation and programming that makes justice more accessible to individuals like James.

I am convinced that there is a great need in our state for access to justice, regardless of one's ability to pay. The time I spent at the Wake County Public Defender's Office was truly valuable, and I felt honored to work in such an organization. I am grateful to IOLTA for providing me with such a generous grant. ■

Ryan Connelly is a second year law student at the University of North Carolina School of Law. He is currently the 2008-2009 Durham Bar Association Scholar. During the summer of 2008, he received an IOLTA grant for his work.

Review—*North Carolina Juvenile Defender Manual*

By Christine Underwood



Anyone practicing in juvenile delinquency court should make room for one more tool in their arsenal.

The *North Carolina Juvenile Defender Manual* is the first-ever manual specific to North Carolina law and practice in this field. Chock full of practice tips, statutory and case law references, and samples, this manual is a field guide to delinquency court. The manual's organization makes it an easy go-to guide even in the midst of the most hectic courtroom situations.

Although juvenile delinquency court has many of the same procedural requirements of adult criminal court, there are complexities unique to the juvenile system. The *North Carolina Juvenile Defender Manual* addresses important issues such as the role of counsel in a juvenile proceeding, a juvenile's capacity to proceed, communicating with a juvenile client, and the unique problems associated with motions to suppress statements made by a juvenile.

Separate chapters, tabbed for easy access, take the practitioner through every stage of a delinquency proceeding, from the intake process through the adjudication and disposition hearings and beyond.

The chapter on petitions and summons not only outlines the procedural requirements of these documents, but identifies fatal defects and variances in petitions and summonses and assists the juvenile defender with evaluations of these common defects.

Juvenile defenders often face the touchy subject of whether or not their client has the capacity to proceed. A significant number of juveniles who find themselves in delinquency court have mental health issues that affect their ability to understand what is going on and to assist their attorney with their defense. The chapter on capacity to proceed gives practice points on investigating capacity and the consequences of questioning that capacity.

Few things affect a juvenile defender more than the sight of his or her young client in shackles and handcuffs. Juveniles in custody typically have one focus - when am I going to be allowed to go home? The chapter on custody and custody hearings takes the juvenile defender step by step through the three types of custody in juvenile delinquency proceedings—temporary custody, secure custody, and nonsecure custody. The chapter discusses when a juvenile can be placed in custody, the procedures for custody both prior to and following adjudication, and the requirements for a hearing before a juvenile may be brought into a courtroom in shackles.

Chapters on probable cause and transfer hearings, discovery, and motions to suppress give the attorney a practical guide to these often overlooked, but very important, aspects of juvenile defense. From a list of sample questions which guides counsel into thinking about what to consider at a probable cause hearing, to procedures for obtaining discovery and sample discovery motions, these chapters take the practitioner from start to finish in pre-adjudicatory investigation of the quality of the state's case against their client.

The role of attorneys representing minors mirrors their role in adult court. Juvenile defenders have the responsibility of discussing with their juvenile clients the benefits and risks of proceeding to a hearing at adjudication or negotiating a plea agreement. The chapter on adjudicatory hearings outlines the responsibilities of counsel and how these hearings are specifically geared toward the juvenile client.

One of the biggest questions all juveniles in delinquency proceedings have is "What is my punishment going to be?" The chapter on dispositional hearings explains to the juvenile defender the predisposition investigation process and walks the practitioner through the dispositional hearings and assists them with understanding delinquency history levels and classification of offenses. The chapter discusses the importance of dispositional alternatives available to the court and the standards for modifications of the dispositional orders.

Chapters on probation, commitment to the Department of Juvenile Justice and Delinquency Prevention, appeals, and expunction wrap up this comprehensive guide to defending the juvenile delinquent.

Whether you are walking into delinquency court for the first time or are a seasoned practitioner, the *North Carolina Juvenile Defender Manual* is one tool the juvenile defender cannot afford to leave in the office. This manual, published by the University of North Carolina School of Government, is part of the North Carolina Indigent Defense Manual Series. It is one guide that will not gather dust on your office bookshelf. ■

North Carolina Juvenile Defender Manual, *UNC School of Government, $60.*

Christine Underwood was recently sworn in as a district court judge in District 22A. While in private practice, she was a contract juvenile defender for Indigent Defense Services and was the CLE Chair for the Juvenile Defense Executive Committee of the North Carolina Advocates for Justice (formerly the North Carolina Academy of Trial Lawyers).

How to Initiate Foreclosure of a Law License

By Katherine Jean

Following the collapse of the housing market, the State Bar Office of Counsel thought our readers might be interested to learn what happens to lawyers who participate in fraudulent real estate transactions. Lawyers can participate in several ways, including as buyers or sellers. This article will focus on closing lawyers who facilitate fraudulent real estate transactions. Often their participation takes the form of false statements on HUD-1 Settlement Statements.

12 U.S.C. § 3500.8 provides that "[t]he settlement agent shall use the HUD-1 Settlement Statement in every settlement involving a federally related mortgage loan in which there is a borrower and a seller." The HUD-1 must reflect all receipts and disbursements connected with a "federally related" loan. The definition of a "federally related mortgage loan" is expansive and, with limited exceptions, includes all mortgage loans obtained in connection with the purchase of residential real estate. 12 USCS § 2602(1). It is a crime to knowingly make false statements on a HUD-1. Title 18 U.S. Code Section 1001 and Section 1010.

Fraudulent conduct by closing lawyers comes in many varieties, including the following:

Phantom Down Payments

The buyer's loan application indicates that the buyer is borrowing 80% of the purchase price of the property and is bringing 20% of the purchase price to closing from her own money. In fact, the buyer does not contribute any money to the purchase price, 100% of which comes from the loan. This means that the actual purchase price is only 80% of the "contract sales price" shown on page one of the HUD-1. It also means that any representation at the bottom of page one that the transaction included "cash from borrower" is false. One lawyer told us she put false information about cash from buyers on HUD-1s because the seller told her he had "forgiven" the buyers' down payments. A private agreement between buyer and seller does not excuse false representations on a HUD-1. If the seller is willing to sell the property for 80% of the "contract sales price," the property is almost certainly worth no more than 80% of the contract sales price. The fact that the lender's collateral is worth substantially less than the lender was led to believe must be disclosed on the HUD-1. The lender also requires the buyer to put some of his own money into the transaction so the buyer will be more personally invested and thus less likely to default on the loan. The HUD-1 must accurately reflect actual receipt and disbursement of the buyer's money and cannot falsely state that money changed hands when it didn't.

"Payoffs" of Non-Existent Mortgages

The HUD-1 indicates that some portion of the loan proceeds are used to pay off an existing first or second mortgage, but no such

mortgage exists. Instead, those funds are given to a third party who has no legitimate role in the transaction. The third party is often the person orchestrating the fraudulent transaction and arranging for the financing. The lender must be notified and any payment to a third party must be reflected on the HUD-1. The HUD-1 cannot reflect that money is being disbursed to satisfy a mortgage that doesn't exist.

Loan Proceeds Routed to Third Parties

The HUD-1 shows a disbursement of $80,000 to the seller as net sales proceeds. From his trust account, the closing lawyer instead issues one check for $20,000 to the seller and another check for $60,000 to a third party whose name does not appear on the HUD-1. The fact that the seller is giving away $60,000 of his net sales proceeds to a third party is a strong indication that the property is worth $60,000 less than the buyer is paying. The lender's collateral is also worth $60,000 less than the HUD-1 represents. The closing lawyer may even receive an invoice purporting to show that the seller owes $60,000 to the third party. The closing lawyer may think that because it is the seller's money, the seller can direct that it be paid to whomever the seller wishes. However, the lender must be notified and the HUD-1 must reflect the actual recipients of loan proceeds. If the seller and the third party do not want payment to a third party listed on the HUD-1, it is because the payment is not legitimate.

Insta-Flips

A lawyer closes the sale of a house from A to B for $50,000. Ten minutes or an hour or a day later, the same lawyer closes the sale of the same house by B to C for $100,000. This is a "flip." The lawyer has undertaken to represent B in the first transaction and to represent C and C's lender in the second transaction. The fact that A was willing to sell the house at noon for $50,000 is a pretty strong indicator that the property was not worth $100,000 at 12:10 p.m. This is material information both C and C's lender are entitled to receive from the closing lawyer, but which the lawyer conceals. In this situation, the Rules of Professional Conduct would prevent the lawyer from actually representing all of these parties, but by undertaking to do so the lawyer assumes clear duties, one of which is to disclose to his clients all material information about the representation. The lawyer cannot defend criminal charges or charges of professional misconduct on grounds that material information was withheld because it was confidential client information belonging to another client.

Title Opinions Showing Would-Be Owner

In the previous example, the closing lawyer prepares a preliminary opinion of title for the title insurer who will insure the interests of C and C's lender. The opinion falsely states that B is the owner of the property. A is still the owner of the property when the opinion is prepared. The lawyer's final opinion of title fails to disclose B's recent purchase of the property. These omissions are intended to conceal the fact that the transaction is a flip.

False Promises to Occupy the Premises

A lawyer closes the purchase of two or more houses by the same buyer in a short period of time. It is perfectly clear that the buyer does not intend to occupy both or all of the houses simultaneously. However, the lender in each transaction requires the lawyer to obtain the buyer's affidavit swearing that she intends to occupy the premises as her primary residence. The deed of trust in each transaction requires the buyer to use the property as her primary residence. The lender cares about this because it knows a buyer is less likely to default on her mortgage if the consequence of default and foreclosure is to lose her home. Also, interest rates and closing costs are generally higher on mortgages for second homes or investment properties and a buyer who does not intend to occupy the premises as her primary residence would not qualify for the loan the lawyer is closing.

Another red flag is a discrepancy in real estate commissions. When the HUD-1 reflects a purchase price of $300,000 but the real estate commissions on page two are calculated as a percentage of $225,000, this is a red flag that the actual price the seller is receiving may be $75,000 less than the "contract sales price" reflected on page one and $75,000 less than the price the buyer is paying, in which case the $75,000 goes to a third party who is not identified on the HUD-1. A closing lawyer would be wise to require legitimate explanation and documentation of such a discrepancy.

For the past two years, the Office of Counsel and the United States Attorneys in North Carolina have devoted particular attention to investigating and prosecuting fraudulent real estate transactions. A lawyer who knowingly facilitated fraudulent transactions will be disbarred and will also likely go to prison. Materiality of a false statement is not a defense in prosecutions under 18 U.S.C. 1010 and 1014. *United States v. Wells*, 519 U.S. 482 (1997); *United States v. Castro*, 113 F.3d 176 (11th Cir. 1997). It is not a defense to criminal charges or to charges of professional misconduct that the buyer, the mortgage broker or the lender's loan officer knew about the fraud. That information just confirms the lawyer's status as a co-conspirator. A lawyer can be prosecuted for averting her eyes from red flags that a transaction is fraudulent, even when direct knowledge of fraud cannot be proven. In an unpublished opinion, the 4th Circuit Court of Appeals affirmed Frederick Lutz' conviction and sentence of imprisonment on a theory of "willful blindness" to a real estate flipping scheme. *United States v. Lutz*, 237 Fed. Appx. 849, 851 (4th Cir. N.C. 2007). Finally, after forfeiting her livelihood and serving time in prison, the lawyer is liable in civil court for actual and punitive damages. All legal malpractice policies exclude coverage for fraud and other intentionally dishonest behavior. Banks and title insurers no longer feel any reluctance to sue lawyers, whether they have malpractice insurance or not. A lawyer can avoid these disastrous outcomes by simply refusing to participate in any real estate transaction in which she either knows or suspects that the paperwork contains false information.

A quick review of the State Bar's website shows the following lawyers who have been disbarred for their roles in fraudulent real estate transactions: Neil G. O'Rourke of Apex; Anthony G. Young of Charlotte; Dwayne A. Bennett of Chester, Virginia; Michael King of East Spencer; S. Allen Patterson of Cary; Frederick Lutz of High Point; Robert Maggiolo of Durham; McArthur Mitchell of Charlotte; Thomas W. Jones of Sylva; Mark Lattimore of Greenville, South Carolina; J. Daniel Pike of Raleigh; Armina Swittenberg of Thomasville; Amy Robinson of Rolesville; and Calvin Finger of Forsyth County. Many of these lawyers are also convicted felons and have served or will serve time in prison. We sadly anticipate more disbarments in the near future. ■

Katherine Jean, who earned a BA and JD from the University of North Carolina at Chapel Hill, is counsel and assistant executive director of the North Carolina State Bar.

When Thank You Isn't Enough

By Cynthia Wittmer

One of the first social graces we are taught as children is to say "thank-you"—for presents, for candy, and for compliments from grandparents and other adults. That simple acknowledgment of appreciation suffices for most of the kindnesses shown to us in this life. But as we grow into adulthood, we occasionally encounter those situations where a simple "thank-you" seems inadequate, where spoken words cannot capture the emotion that wells up at the mere thought of some blessing we have experienced. On those occasions, our own internal moral compasses expect, even demand, something more of us.

Cindy Wittmer participates in the survivors procession at the end of the 2008 Triangle Race for the Cure.

I experienced this reaction when each of my children was born. Despite difficult deliveries that would have likely killed me and both of them less than a century earlier, I ended up with two healthy, happy children, relatively unscarred by the circumstances of their births. The thought still overwhelms me—through no action deserving of such special good fortune, I was the lucky recipient of some of the best health care available anywhere in the world. I was acutely aware that many other mothers, equally deserving of the same standard of care, suffer the consequences of less adequate health care every day and in every part of the world. A mere thank-you for my unearned good fortune seemed grossly insensitive to the enormity of the benefit I had received. Perhaps it was runaway hormones, but I wanted nothing less than for every other mother to share my experience—if not worldwide, at least in Raleigh, North Carolina.

Admittedly, it was an ambitious and naive goal (unaccomplished as of yet even by Congress), and my ideas for achieving it soon ran into obstacles, red-tape, and the kind of thinking that often keeps our best instincts from reaching fruition. Ultimately, I adopted the more modest and personal challenges of combining motherhood and the practice of law—learning to accept the burped-up milk on my business suit as a

badge of honor for all I was able to juggle.

In the year I turned 50, however, I encountered a new and unexpected challenge—one that required even greater good fortune to address. I had a rather large lump in one breast, but having routinely had benign cysts for years, I was in no particular hurry to have it checked. I waited for my annual exam, and even cancelled one appointment in order to attend a CLE offering. When I eventually saw the doctor, some three months after noticing the lump, it only took seconds for his face to tell me that my assumption that this lump was simply another cyst had been ill-advised. "Cindy, I believe this is cancer," he said. The words reverberated inside my head; no one in my family had ever had breast cancer and I had never considered myself a candidate. The possibility began to seem more real, however, when later that day I also discovered a large lump under my arm. In addition to being scared, I felt exceedingly careless and naive.

Two days later, following mammograms, ultrasounds, and a needle biopsy at the surgeon's office, the diagnosis was confirmed. I did in fact have a two-inch diameter, cancerous tumor in my right breast and enlarged lymph nodes under my arm. Following more doctor visits, tests, and procedures, the cancer was ultimately "staged." Given the size and aggressiveness of the tumor, as well as the lymph node involvement, it was classified as a stage "3B" tumor out of a maximum of 4. It could only have been worse if it had spread beyond the lymph nodes to other organs.

From the first mention of the word "cancer," my driving concern was whether or not I was going to survive. With two children ages 13 and 15, I had to know the potential impact of my diagnosis on their lives. It was not easy to get an answer to the question, regardless of how many times I asked it. Statistical charts in a breast cancer book were not encouraging, but one doctor finally told me that my chances of surviving were "better than not." The answer was good enough—at least the odds were in my favor. As more tests came in, the answer became more detailed, but the big picture was the same.

Over the next three years, I underwent 18 weeks of chemotherapy, two separate mastectomies, ten weeks of daily radiation, weeks of self-administered shots to my stomach, two surgeries for reconstruction, and untold numbers of x-rays, CT scans, MRIs, procedures, injections, blood collections, and examinations. I got so I didn't even wince at the insertion of a needle into my vein. Now, four and a half years after that first procedure, I am alive, my hair has long since grown back, and—as best anyone can tell—I am well. Along the way, I came to value even more my family and friends, the poetry of life, the simplest of pleasures, and the glory of each day. Most importantly, I learned to let go—at least to some extent—of the things I could not change, and to accept that I would never be caught up on my "to do" list.

I believe that every one of my doctors is the greatest physician on earth. I trusted them with my life, and they didn't let me down. I have taken them food and gifts, written them, and thanked them, but those expressions of appreciation, measured against what I received, are akin to comparing an ant to an elephant—they aren't even in the same arena.

How does a person show appreciation for a life saved? There was nothing of equal value that I could do for the physicians, nurses, and technicians who so capably helped me. But I don't think they were looking for that kind of response. The one thing I could do, however, was to "pay it forward" in some way, as urged by the angelic-faced young boy in the 2000 movie by the same name. So I have tried to find ways, even though they seem small, to help others who find themselves in the same position as I was. As a member of the Wake County Bar, I had a ready-made mechanism to increase the impact of my efforts.

My first challenge was to organize a team for the Susan Komen Foundation's Triangle Race for the Cure. My husband had formed a team in my name shortly after my diagnosis, so I had something to build upon. Friends, family, and law firm members were a great support, and I was encouraged. The next year, I first asked my law firm to be a sponsor, and the firm readily agreed. Emboldened, I then asked the Wake County Bar Association to be a sponsor, and the president readily agreed. However, we then had to raise the $10,000 required for the Bar Association to meet that commitment. We divided up a list of the major firms, and began making calls. Within a few weeks, we had commitments for over $13,000! I believe we raised over $30,000 that

CONTINUED ON PAGE 30

Pro Bono Work and Community Service in North Carolina's Law Schools

By Kelly Gondring

My world is black and white, or so it seems most days. Law students seem to be on one of two tracks—private law firm or public interest organization—and the most extreme students on these two tracks appear to be diametrically opposed to one another. Not only is there a failure to understand the value of the work done by "the other side," but there is also a failure to respect the others' choice of a particular type of work. Even among my friends.

Susan and Allen are friends on different tracks. Susan came to law school knowing that she wanted to work in real estate finance at a big Charlotte firm. She is hard-working and enthusiastic about the work she will do. Allen, on the other hand, came to law school knowing that he wanted to be a public defender. He is also hard-working and enthusiastic about the work he will do. However, despite the fact that they are friends, there is tension between them because Allen does not understand the work that Susan wants to do. It's not that he can't understand it on the intellectual level; it's that he doesn't understand why someone would want to work in that area of the law or why Susan is "selling out."

What I wish Allen would see is the massive gray area that lies between him and Susan.

Susan has completed over 100 hours of pro bono work. She has participated in

research projects for Legal Aid and helped nonprofit organizations with transactional matters through the Pro Bono Project. She completed pro bono projects for the firm at which she worked during her first and second summers. These projects were not handed to her by the managing partner; she sought them out because she wanted to do them.

As wonderfully exemplified by Susan's dedication, pro bono work and community service by law students is the norm and not the exception. Not everyone comes to law school fresh out of the Peace Corps hoping to use their law degree to save the world and help the poor—and that is okay because law students choosing to pursue a career in the private sector are still able to connect to their communities and help those less fortunate than themselves.

Law schools in North Carolina continue to emphasize the importance of giving back to the community, encouraging all students to participate in pro bono work and community service projects. First-year students at the University of North Carolina School of Law are asked to sign a pro bono pledge, where incoming students pledge to complete a certain number of pro bono hours by the time of graduation. Last year, UNC law students completed 16,765 pro bono hours, not including the thousands of hours completed by third-year students participating in one of the school's four clinical programs. In fact, over winter break, 115 students participated in pro bono projects in 40 different organizations across 11 states. UNC also recognizes students who have completed more than 75 hours of pro bono work by indicating this accomplishment on student transcripts.

Similarly, during their three years in law school, the Class of 2007 at Duke University School of Law volunteered 19,168 hours of legal service through their clinical programs and various pro bono projects. Like the UNC School of Law, Duke Law also encourages its first-year students to sign a pro bono pledge and dedicate a certain number of hours to pro bono work during their law school career.

Law students attending Wake Forest School of Law volunteer as Guardians Ad Litem, tutor children at local elementary schools, represent victims of domestic violence, and serve as judges in Teen Court. Similarly, in the Juvenile Justice Mediation Program at Campbell School of Law, students mediate cases between juvenile defenders and their victims. The program's success has led to its expansion, such that students also mediate problems between high school students prior to any criminal charges being filed. At North Carolina Central University School of Law, a total of 154 law students participated in pro bono projects last year, volunteering with 28 public interest organizations and governmental agencies, six student organizations, and nine public schools through their Street Law Program. During their second year, Elon students participate in the required Public Law and Leadership course, working in teams on legal projects for non-profit organizations. Elon students may choose a Public Service concentration for their upper level elective courses. During the third year, students have the option of undertaking a capstone leadership project to benefit the school, community, or the world. Finally, in order to successfully graduate from the law program at Charlotte School of Law, students are required to complete 20 hours of pro bono service and ten hours of community service. These law schools encourage their students to participate in pro bono work regardless of whether they choose to remain in North Carolina or leave for New York, whether they are exemplary or middle-of-the-road students, and whether they will pursue a career as a real estate finance associate or a public defender.

Like Susan, Allen has also completed over 100 hours of pro bono work. He has volunteered for pro bono projects each semester that he has been in law school, researching for a gay rights organization and helping victims of domestic violence obtain restraining orders against their alleged abusers. While Allen did not complete projects during his summer employment, he spent both summers working at the Public Defender's Office aiding indigent defendants in their legal defense.

For those of us who did come to law school with hopes of using our law degrees to help others fight for their constitutionally protected civil liberties or to help the poor and downtrodden, pro bono work and community service is an ever-present reminder of that original hope. Law school, especially the first year, is an overwhelming experience. As I worked to master a new language that felt funny on my tongue and sounded strange to my ears, even my most anxiety-ridden expectations were exceeded. I had expected difficult; I had not anticipated demoralizing.

When I began to learn the language of the law, it felt cold and impersonal. To think and express myself as an attorney largely meant putting away my emotional feelings of fairness and equity and learning to express myself in terms of logic and precedent. After all, the reason the courts compensate tort victims has nothing to do with whether I think it is the "right thing to do," but rather whether the tortfeasor had a duty of care, whether she breached that duty, and whether this breach caused harm to the plaintiff. Not only did I have to alter the way I viewed the world, but as I learned about important concepts such as *in rem* jurisdiction, joint tenancy agreements, and contributory negligence countersuits, I rarely saw the faces of the people affected by these foreign concepts.

My solution was to further immerse myself in the law by reading more intently and joining a study group. Not surprisingly, I could not seem to find the answers in well-written cases about constructive possession or personal jurisdiction; instead, I found the faces I sought in my winter break pro bono project at Legal Aid.

While the legal issues of this project were neither profound nor complex, the experience changed the way I looked at the law and also validated my choice to attend law school. Ironically enough, I never met the client for whom I did all of this work, as it was a research project about the Indian Child Welfare Act. Nevertheless, I found it rewarding because I finally had a glimpse at the law as it affected real people. Because of this gratifying experience, I continued to work on pro bono projects. Staying connected gave me a way to see more clearly the people behind the logical thinking expressed in case law. While the law itself is not always compassionate on its face, the people who fight to have the law enforced or fight to change the law are logical, zealous, and compassionate advocates. Doing pro bono work not only reminds public interest-minded students that the law does not have to be strictly logical and impersonal, it also keeps them connected to the issues and people who live and breathe outside the law school bubble.

Regardless of a law student's long-term career goals, another realistic reason for all law students to participate in pro bono projects is to give them hands-on, practical experience. While there are many substantively interesting areas of the law, not everyone is cut out to practice every area of the law. Pro bono work gives students the opportunity to learn whether they would actually like to work in a

particular area of the law, or whether they should pursue an alternate field.

For example, I learned that while I find criminal law very interesting, I would prefer several painful deaths to being in a courtroom every day as a trial attorney. Working at the Office of the Colorado Public Defender during my 1L summer was an amazing, insightful experience, but I am not suited for that line of work. Volunteering at the Appellate Public Defender's Office, on the other hand, gave me the opportunity to work in criminal law without having to be in the courtroom as a trial attorney. Similarly, my friend Kate determined that she wanted to do policy work after completing an extensive pro bono project for an immigration firm. Even before participating in this project, she knew that she would like to work on immigration issues; however, she did not know in what capacity. Her experience provided her with much needed clarity into the career path she should pursue.

Part of the practical experience gained from participating in pro bono work also includes learning how to undo some of what is learned in the classroom. Because law students are essentially learning a new language, they must practice in order to become comfortable and proficient in it. While this is undoubtedly important, once students become fluent in the language of the law, they often forget how to communicate in plain English with those who have not attended law school. Pro bono projects that place students in direct contact with real clients require the students to translate legalese into an understandable common language.

Perhaps the most important reason for law students to actively engage in pro bono work is also the most obvious reason: to help others. Clearly, pro bono work and community service in law school do more than just create commonalities between two friends' vastly different career paths. They create avenues for giving back and serving communities that cannot afford to pay for their very real legal needs. Even more than that, it reminds students that success is not measured solely by a high grade point average or by being the best oral advocate in the school, but that success can be defined by our willingness to look past our own needs in order to offer those less fortunate than ourselves the tools to thrive. Life is not just about the quantitative measures of our abilities, but also the qualitative measures of our character. Besides a friendship, what Allen and Susan share is the gray area between his future job as a public defender and her future job as a real estate finance associate: they both find fulfillment when they are part of the reciprocity that comes with actively participating in pro bono work and community service projects. ■

Kelley Gondring is a third year law student at the University of North Carolina School of Law. She is a member of the North Carolina Law Review, serves as co-president of the Lambda Law Students Association, and hopes to practice law staying committed to the idea that one lawyer really can make a difference.

Thank You (cont.)

year, although I didn't have a reliable method of tracking the donations.

In 2007, I suggested forming a Wake County Bar Association team for the race. Although the association did not feel it could commit to being a sponsor for another year, Wake County attorneys were very supportive of the team. We had a t-shirt slogan contest, and Attorneys Title Insurance Company paid for the t-shirts in exchange for putting their name on the shirts. We selected a slogan ("Wake County Bar Association: We're Raising the Bar" with "Lawyers Helping in the Community" underneath) that wasn't identified with the Komen Race, so we could use the t-shirts at any of the WCBA's community service projects. Our bright green t-shirts were noticeable in the crowd on race day, and they make a memorable statement of the role lawyers play in the community whenever they are worn. We had 118 team members sign up and raised over $23,000, including one law firm sponsorship.

In 2008, fewer attorneys signed up as members of the Wake Attorneys team, but there were many more law firms with their own teams and t-shirts, perhaps inspired by the success and fun experienced by the Wake Attorneys team members. The WCBA appointed a coordinator to help with the project, and this time Chicago Title Insurance Company sponsored our t-shirts. The Wake Attorneys team itself had 44 members and raised almost $9,000, but that was only part of the story. Four law firms were sponsors of the race, and collectively, all of the various Wake County attorney teams had 371 team members and raised almost $53,000 for the fight against breast cancer!

My second project was to start a breast cancer support group for Wake County attorneys and/or relatives. Three people immediately expressed interest in a group after I ran an ad in the WCBA newsletter. We currently have eight participants, including one male who has had breast cancer and two members who come because of relatives who have had or currently have breast cancer. We meet once a month for lunch, and have an annual Christmas dinner hosted by one member of our group. Our purpose is to support new participants, share information on treatment or follow-up issues, try to respond to questions, help with various breast cancer efforts, and simply be present for each other in the experience of cancer. We have become good friends and our monthly lunches are more fun than they are serious.

Neither of these projects has changed the world. And what they have accomplished is less the result of my small efforts than the amazing response of other attorneys. The experience has taught me that the vast majority of attorneys are wonderful, caring people who rise quickly to any opportunity to be of service or meet a need. By their enthusiasm, ideas, skills, contacts, and efforts, they can broaden the scope and magnify the impact of any one person's ideas. It's easy to look around and feel that the problems are enormous and our own resources too small by comparison to make any difference. But I'm trying to learn that it's worth taking the first step, even if you can't see where the journey will end—you never know who may join you on the walk. And even if what is accomplished is small, it's okay. In the words of Mother Theresa: "In this life we cannot do great things; we can only do small things with great love." That's a challenge we all can meet. ■

Cynthia Wittmer is a partner with Parker Poe Adams & Bernstein, LLP, in its Raleigh office. She has practiced law since 1981, focusing on commercial and intellectual property litigation, and contracts. She has served on the State Bar Council for two years.

Overview of the Disciplinary Process

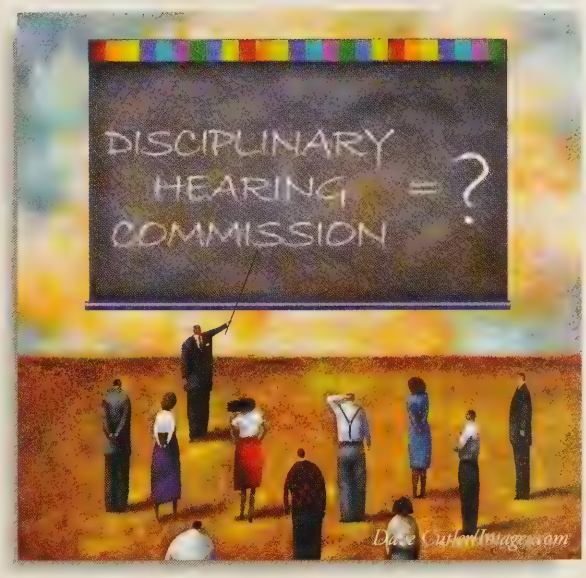
By Office of Counsel, North Carolina State Bar

The State Bar's Grievance Committee investigates and acts upon alleged violations of the North Carolina Rules of Professional Conduct. The Grievance Committee has 45 members, all appointed to serve on the committee by the president of the State Bar. Forty-two members of the committee are also members of the State Bar's governing body, called the Council. Of those, 40 are practicing lawyers elected by their peers from each judicial district and two are nonlawyers. There are also three advisory members of the Committee who are not lawyers and are not Bar Councilors.

The Grievance Committee is divided into three subcommittees. Each subcommittee has direct responsibility for investigating approximately 1/3 of the total grievances and recommending appropriate resolutions to the full Grievance Committee. The full committee votes upon the subcommittees' recommended resolutions. The State Bar's legal department, the Office of Counsel, serves as counsel to the Grievance Committee.

In addition to the State Bar's Grievance Committee, several judicial districts also have grievance committees. The district committees help the Grievance Committee by investigating some grievances filed against lawyers who practice in those particular judicial districts. Grievances are filed directly with the district committees or are referred to the districts after they are filed with the State Bar. The district committee submits a report to the Office of Counsel detailing its investigation and recommending whether the Grievance Committee should or should not find probable cause to believe the respondent lawyer violated a Rule. District committees do not impose discipline or dismiss grievances.

The Disciplinary Hearing Commission (DHC) is an independent tribunal that hears all contested disciplinary cases. The DHC is composed of 12 lawyers, appointed by the State Bar Council, and eight nonlawyers, appointed by the governor and the General Assembly. The DHC sits in panels of three; two lawyers and one nonlawyer. In addition to disciplinary cases, the DHC hears cases involving allegations that a lawyer is disabled and petitions from disbarred lawyers seeking reinstatement.



The Process

Grievances may be filed by clients, judges, opposing parties, fellow lawyers, or members of the public. The Office of Counsel also opens grievance files on its own initiative when it learns of misconduct through the news media or other sources.

Rule 8.3 requires a lawyer to report to the State Bar when he or she knows of professional misconduct by another lawyer that "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." However, the State Bar can keep confidential the identity of a lawyer or a judge who reports alleged misconduct of another lawyer. N.C. Admin. Code title 27, r. 1B.0111(d). The identity of a reporting lawyer or judge will only be revealed when disclosure is required by law or due process or when identification is essential to the respondent lawyer's ability to present a defense. A lawyer who fails to report misconduct as required by Rule 8.3 is subject to discipline.

Presently, a grievance must be filed within six years of the alleged misconduct, except when it is alleged that the respondent lawyer concealed the misconduct or when the alleged misconduct would constitute a felony. N.C. Admin. Code title 27, r. 1B.0111(e). A new rule governing the time within which a grievance must be initiated has been approved by the State Bar Council and will soon be submitted to the Supreme Court for final approval. The proposed new rule can be found on the State Bar website (www.ncbar.gov) and in the Fall 2008 State Bar *Journal*.

The Grievance Committee

Grievance proceedings are confidential unless a lawyer receives public discipline from the Grievance Committee or a formal disciplinary complaint is filed against the lawyer in the DHC. N.C. Admin. Code title 27, r. 1B.0129.

Each grievance is assigned to a deputy counsel in the Office of Counsel. The deputy counsel investigates the allegations, often aided by State Bar investigators. All of the State Bar's investigators worked for state or federal investigative agencies, including the FBI, SBI, IRS, and Treasury Department, before joining the State Bar.

When the allegations of a grievance, even if true, fail to state a Rule violation or if available evidence conclusively disproves the allegations, the Office of Counsel submits a report to the chair of the Grievance Committee recommending dismissal with no further action. If the chair agrees with that recommendation, the grievance is dismissed. N.C. Admin. Code title 27, r. 1B.0105(a)(19). In such cases, the respondent lawyer is not asked to respond and is often not even aware that the grievance was filed.

When the allegations, if true, state a Rule violation and available evidence does not conclusively disprove the allegations, the Office of Counsel sends the respondent a Letter of Notice and accompanying Substance of Grievance detailing the allegations of misconduct. The respondent must submit a written response within 15 days from receipt of the Letter of Notice, although extensions of time to respond are regularly granted. After it receives the written response and conducts any necessary additional investigation, the Office of Counsel prepares a Report of Counsel to the Grievance Committee. The Report of Counsel contains summaries of the complaint and the response, analysis of the evidence, the respondent's disciplinary history, and a recommended resolution.

If the evidence does not support a finding that a Rule was violated, the Office of Counsel recommends that the grievance be dismissed without further action. If the chair of the Grievance Committee and the chair of one subcommittee agree, the grievance is dismissed. N.C. Admin. Code title 27, r. 1B.0105(a)(20). If the Office of Counsel concludes there is probable cause to believe the respondent committed a Rule violation or if no rule violation occurred but the respondent should be cautioned about the conduct, the grievance will be considered by the full Grievance Committee through one of its three subcommittees and resolved in one of the following ways.

Sometimes the Grievance Committee disagrees with the Office of Counsel's recommendation and dismisses the grievance. The committee can also dismiss a grievance with a Letter of Caution when no Rule violation occurred but the lawyer's conduct was inconsistent with accepted professional practice or dismiss with a Letter of Warning when the respondent committed a technical or inadvertent Rule violation.

When it finds probable cause to believe that more than a technical or inadvertent Rule violation occurred, the committee can either impose discipline or refer the grievance to the DHC for trial. It is the Grievance Committee's policy to refer to the DHC only cases in which the committee believes the appropriate discipline may be suspension or disbarment. The Grievance Committee is not itself empowered to suspend or disbar a lawyer.

When it believes the appropriate discipline is less than suspension or disbarment, the Grievance Committee can impose three levels of discipline—admonitions, reprimands, and censures, in ascending order of severity. The respondent may reject an admonition or a reprimand and may, by failing affirmatively to accept it, also effectively reject a censure. If the respondent rejects discipline imposed by the Grievance Committee, the Office of Counsel files a complaint with the DHC and a formal hearing occurs. N.C. Admin. Code title 27, r. 1B.0113 and 1B.0114.

Admonitions are permanent, private discipline and do not appear on the judgment docket of the State Bar, although they may be considered in any later disciplinary proceedings against the respondent. Reprimands and censures are permanent discipline and are recorded in the State Bar's judgment book, posted on the State Bar's website, and sent to the complainant. Censures are also filed with the clerk of superior court in the respondent's home county and filed with the clerks of the appellate courts. Notices of both reprimands and censures appear in the State Bar *Journal*.

Finally, the Grievance Committee can directly refer a grievance to the DHC. The cases most often referred to the DHC involve misappropriation of client or fiduciary funds, criminal acts or other acts of dishonesty, and repeated neglect of professional responsibilities, including failing to communicate with clients and failing to respond to inquiries from the State Bar.

The Disciplinary Hearing Commission

The Office of Counsel represents the State Bar in DHC proceedings. DHC trials are open to the public. They are conducted according to the North Carolina Rules of Civil Procedure and the North Carolina Rules of Evidence. DHC complaints look very similar to civil complaints filed in superior court. Hearings are divided into two phases. In phase one, the State Bar has the burden of proving each alleged Rule violation by clear, cogent, and convincing evidence. If the State Bar fails to carry its burden of proof in phase one, the case is dismissed. If the DHC finds that some or all of the alleged violations have been proven, the DHC moves immediately to phase two. In phase two, the DHC hears additional evidence and decides the appropriate discipline.

Like the Grievance Committee, the DHC can dismiss the charges or issue a letter of warning, admonition, reprimand, or censure. It can also suspend a law license for up to five years or disbar a lawyer. The DHC can stay all or a part of a suspension upon compliance with stated conditions. A disbarred lawyer is eligible to apply for reinstatement five years after the effective date of disbarment. The disbarred lawyer bears a heavy burden of proving reformation and rehabilitation, and reinstatement is very rare. No disbarred lawyer has been reinstated since 1994.

Either party can appeal a DHC order to the North Carolina Court of Appeals. N.C. Gen. Stat. § 84-28(h). Disbarments and suspensions exceeding 18 months are stayed on appeal only upon *writ of supersedeas*. N.C. Gen. Stat. § 84-28(h). All other discipline imposed by the DHC is automatically stayed on appeal. ■

IOLTA Remains Strong in Difficult Times

IOLTA Meets Another Challenge

Concerns over the unintended consequences of a change to FDIC coverage as part of the Temporary Liquidity Guarantee Program (TLGP) were allayed when the FDIC specifically included client funds deposited in IOLTA accounts as eligible for unlimited deposit insurance coverage (through December 31, 2009, unless extended). All funds in an IOLTA account, regardless of size, will now be insured in full by the FDIC and backed by the full faith and credit of the United States Government unless the bank opts out of the program with posted notices. (See Trust Accounting article on page 36 for additional information.)

When established in October, the TLGP fully guaranteed funds in non interest-bearing accounts. An unintended consequence of this decision would have meant that large client deposits (currently over $250,000) in IOLTA accounts would have been less secure than if held in non interest-bearing accounts. The FDIC's decision to provide the same unlimited coverage to IOLTA accounts was a response to the urging of the ABA, the National Association of IOLTA Programs, the National Legal Aid and Defender Program, and many legislators, local bars, and attorneys during the comment period for TLGP rule making. (We are told that over 500 of the approximately 750 comments received were about IOLTA).

Income

All information on IOLTA income earned in 2008 will not be received and entered until January 31, 2009. We do know, however, that 2008 income will exceed the 2007 record-breaking year (when we made over $4.6 million in total income) by surpassing $5 million for the first time.

We are very fortunate to be posting an increase in income as most IOLTA programs are reporting decreases. In fact, many programs are reporting very significant decreases—some by as much 50% or more. In many states IOLTA programs are drastically cutting grants and some legal aid programs have already had to lay off staff due to the loss of grant funds. The income decreases are a result of the economic downturn, which means not only are interest rates generally lower, but there are also lower principal balances in the accounts. We were saved from the same fate during 2008 by moving to a mandatory program which added over 3,300 new IOLTA accounts. (We have, however, also worked with attorneys and law firms to close a number of dormant or inactive accounts.) The deadline for compliance with the now-mandatory IOLTA program passed on June 30, 2008. Through the third quarter, income from all accounts increased by 20%. We estimate that income would have decreased by around 12% if we had not moved to a mandatory in 2008. Twenty-four percent of our income for 2008 came from new accounts.

Banks

There are now over 100 banks in North Carolina that have IOLTA accounts. We continue to work with the banks to improve their IOLTA policies. Banks that waive service charges and/or provide a higher yield on IOLTA accounts are noted on the NC IOLTA Bank List posted on the State Bar website. By the end of the third quarter, the six banks with the largest number of IOLTA accounts were all higher yield banks (currently .8%), though the most recent change to the fed rate has meant that some banks are changing their policies. Our most urgent negotiations are with the five banks that are remitting $0 to IOLTA (Fidelity, Southern, North State, Crescent State, and TriStone) due to low interest rates and high service charges.

Grants

Given the economic crisis and concerns over its effect on IOLTA income going forward, the trustees kept total grants flat for 2009 and determined to move income

increases for 2008 into reserve (presently at $1.8 million) so those funds will be available to keep grants steady for 2010 if necessary. Given the uncertainty of 2009 income, they also made fewer matching grant offers. For 2009, they made $4,101,270 in grants with $55,000 in matching offers in response to 43 requests totaling $5,687,064. In comparison, for 2008, they made just over $4,085,817 in grants in response to $5.2 million in grant requests and offered $125,000 in matching grant funds, all of which were met. To keep our core "category one" grants for provision of legal aid to the indigents steady, the trustees decreased a number of our regular administration of justice grants.

State Funds

During calendar year 2008, NC IOLTA administered over $6.3 million in state funding for legal aid on behalf of the General Assembly acting through the State Bar.

CONTINUED ON PAGE 36

A Profile in Specialization—Christa McGill and Virginia Noble

AN INTERVIEW BY DENISE MULLEN, ASSISTANT DIRECTOR OF LEGAL SPECIALIZATION

I recently had an opportunity to talk with Christa McGill and Virginia Noble, board certified specialists in Durham. McGill earned her undergraduate degree at Georgetown University and graduated from Duke University Law School. She began her legal career with the Social Security Administration in Baltimore, working on legislation and also gaining valuable litigation experience. Noble earned her undergraduate degree at the University of North Carolina at Chapel Hill and graduated from Duke Law School. Her early legal experience came at the Equal Employment Opportunity Commission in Washington, DC, adjudicating federal claims for discrimination. McGill and Noble returned to Durham to open their firm, McGill and Noble, Attorneys, in 1991. Subsequently, both have pursued additional degrees, McGill earning a PhD in Sociology at Duke, and Noble earning a PhD in History at UNC. They each became board certified specialists in social security disability law in 2006.

McGill (left) and Noble (right)

Noble and McGill both practice social security disability law, and they also handle veterans disability compensation cases. Here are a few of their comments about the specialization program and the impact it has had on their law firm and their careers.

Q: Why did you pursue certification?

McGill: Certification was an avenue of validation for our experience, skills, and knowledge in this practice area.

Noble: It also communicates to the public an ability to provide better representation in this field of law than a general practitioner could. Neither of us was discouraged by the idea of taking another test!

Q: How did you prepare for the examination?

McGill: Since we took the exam the first year that it was offered, we weren't sure what to expect. The committee had put out some study materials online that were helpful. We also used an assortment of practice guides from other practitioners across the nation.

Q: Was the certification process (application, exam, references) valuable to you in any way?

Noble: The exam was helpful mostly in revisiting areas that you don't encounter in your practice every day. It's a way of forcing yourself to take the time to sit and study a particular area of the law in depth. Of course, in the moment, you're pressed and grumbling, but in the long run, it is definitely beneficial.

McGill: It was also a good way to get feedback from judges we had asked to serve as references.

Q: Has certification been helpful to your practice?

Noble: Yes, it has. Clients and potential clients feel more comfortable that we're prepared to handle their cases at all levels, including federal court. Having the board certification is also a good way for other lawyers to know that they can refer cases to you.

McGill: We often use the online directory to make referrals to other specialists. It helps us to refer with confidence.

Q: What do your clients say about your certification?

Noble: Some are aware of it and understand the certification. Our clients have varying degrees of sophistication about the legal process. Some see the words "board certified specialist" and it catches their eye in a yellow pages ad or online. Even if some clients don't understand the designation, it's nice to have a legitimate way of communicating the focus of our practice.

Q: How does your certification benefit your clients?

McGill: Since we are dedicated to this practice area and are committed to keeping current with any legal or administrative changes, we are able to provide our clients with the depth and breadth of knowledge needed to handle their cases in the most competent and efficient way possible.

Q: Are there any hot topics in your specialty area right now?

Noble: One area of contention is the Equal Access to Justice Act. It was designed to facilitate access to the federal courts by making the government pay portions of the legal fees in certain circumstances. There are different interpretations of the Act, though, and disagreements about whether those fees should be paid directly to the attorney or to the client.

Q: How does your certification relate to those?

Noble: As board certified specialists, we feel an obligation to stay on top of current issues in this practice area. We have a responsibility to live up to the standards of specialization set out by the Bar.

McGill: We use several different resources to stay current in this field, including national and local continuing legal education courses, excellent practice area list-serves, and a wealth of information that comes through our national association, the National Organization of Social Security Claimants Representatives (NOSSCR). There are also quite a few attorneys who blog about their social security cases. These are a great resource for practice tips, legal changes, and links to many other informative websites.

Q: How is certification important in your practice area and in your region?

McGill: Since there are nonlawyer representatives who also assist social security claimants, having this State Bar certification has been a great way for us to distinguish ourselves to the public.

Noble: This is particularly important in our practice area because our clients are among society's most vulnerable groups. They are sick, unemployed, and facing a large, indifferent bureaucracy. In many cases, they're not highly educated, and their resources are quite limited. They find us through the phonebook, or through advice from friends and family. The specialization designation is an easy way for them to identify experienced attorneys dedicated to this practice area.

Q: How does specialization benefit the public? The profession?

Noble: It's always useful for the public to have more information, especially in the areas that the State Bar offers for certification (see sidebar, above). The program benefits the profession overall by elevating the competence of its members. Each specialist who improves his or her skills and knowledge of the practice area contributes to raising standards in the profession.

CONTINUED ON PAGE 39

Specialty Areas Offered

Bankruptcy
Criminal
Elder Law (**New for 2009!**)
Estate Planning
Family
Immigration
Real Property
Social Security Disability
Workers' Compensation

Congratulations to the Newest Board Certified Specialists

Estate Planning
Christina G. Hinkle
Christopher Jones
Andrew Nesbitt
Jill L. Raspet
Todd A. Stewart
Sarah E. Tillman
Victoria Windell

Immigration Law
Lisa R. Brenman

Social Security
David L. Best

Family Law
Rachel C. Campbell
Jacob C. Ehrmann
Debra A. Griffiths
Monica R. Guy
Dana Lehnhardt
Jennifer L. Lupton
Kevin L. Miller
Julianne B. Rothert
Samuel S. Spagnola
Kary C. Watson

Real Property Law
Jeffrey J. Johnson (Commercial)
John W. King (Residential)
William K. Packard (Commercial)

Workers' Compensation
Thomas M. Clare
Jack S. Holmes
John F. Morris
Susan E. Rhodes

These lawyers were certified by the North Carolina State Bar Board of Legal Specialization on November 13, 2008.

Bruno's Top Tips for Tip Top Trust Accounting

By Bruno DeMolli

Bruno's Fall 2008 Journal *article provided information on FDIC insurance and the coverage it provided for trust accounts prior to recent action under the Temporary Liquidity Guarantee Program (TPGP). In lieu of an article explaining that action, we are re-printing a press release from the ABA Commission on Interest on Lawyers' Trust Accounts reporting the good news that IOLTA trust accounts are now fully insured by the FDIC.*

New FDIC Rule Provides IOLTA Accounts Unlimited Insurance at Participating Banks[1]

On October 14, 2008, the FDIC announced the Temporary Liquidity Guarantee Program (TLGP). The purpose of the TLGP, as stated by the FDIC, is to "strengthen confidence and encourage liquidity in the banking system by guaranteeing newly issued senior unsecured debt of banks, thrifts, and certain holding companies, and by providing full coverage of *non-interest bearing deposit transaction accounts*, regardless of dollar amount."

As it was originally drafted, the interim rule which created the TLGP had the effect of making client funds in excess of $250,000 held in IOLTA accounts ineligible for unlimited insurance unless moved from the IOLTA account to non interest-bearing deposit transaction accounts. This had great potential to severely reduce IOLTA income.

Fortunately, the American Bar Association, the National Association of IOLTA Programs and individual members of the IOLTA community organized quickly to provide the FDIC with comments on the negative impacts of the transaction account guarantee component of the TLGP, and the nature of IOLTA accounts. The FDIC received hundreds of comments from other key organizations including the National Conference of Bar Counsel and the National Conference of Bar Presidents, as well as members of Congress and individual bar leaders. Fifty IOLTA program chairpersons signed a letter urging unlimited insurance on IOLTA accounts.

On November 21, 2008, the FDIC adopted a final rule in which the category of non-interest bearing transaction accounts *includes* IOLTA and functionally equivalent accounts, and provides for unlimited insurance for such accounts held in participating financial institutions through December 31, 2009. ABA President H. Thomas Wells commended this move, saying that the FDIC had remained "[c]onsistent with its mission to ensure stability in the banking community, [while acting] to protect client funds and assure continued funding for programs that provide legal aid to poor people when economic uncertainties make the need for legal guidance most critical."

Banks were automatically enrolled in the program until December 5. By that date, those that did not want to be enrolled were to "opt-out" of the transaction account guarantee component of the TLGP. The FDIC will maintain a list of financial institutions that have opted out through its website. In addition, banks are required to post notice of their participation or non-participation in the transaction account guarantee component of TLGP in their lobbies and, if they engage in internet banking, on their websites by December 19, 2008. For more information regarding the TLGP, go to www.fdic.gov. ■

Endnote

1. ABA Commission on Interest on Lawyers' Trust Accounts, available at www.abanet.org/legalservices/iolta/ioltfdicrule.html#.

IOLTA (cont.)

Future Plans

Celebrating our history. Throughout 2009, we will be celebrating the 25th anniversary of the Plan for Interest on Lawyers Trust Accounts—more popularly known as NC IOLTA. Established in 1983, the program was implemented during 1984. In celebration, the NC State Bar *Journal* will publish a three-part series of articles on NC IOLTA. The first article (on page 18 of this edition of the *Journal*) focuses on the program's establishment and its exceptional leadership throughout its history. Future articles will discuss the ups and downs of IOLTA income over the years and highlight some of the grants made by the program over the years.

Considering new paths. The NC IOLTA trustees have engaged a consultant to analyze our bank and account data to determine whether requiring comparability of bank policies in North Carolina would provide significantly increased income. State Bar President John McMillan has made exploring comparability a goal of his presidency, and the director and chair of the NC IOLTA Board met with the NC State Bar Issues Committee during the January council meeting to discuss the concept. We hope to have information from the analysis of our accounts for President McMillan to share with the State Bar Council at its April meeting. Under comparability, attorneys are required to keep their IOLTA accounts at banks that will agree to pay the interest rate generally available to other customers when IOLTA accounts meet the same minimum balance or other requirements. Twenty-four states have implemented comparability and report significant income increases from the change with no disruption to attorney-banking relationships. ■

Peter Sack

"I am interested in creating new narratives from existing photographs. Whether it be from an old yearbook or old baseball pictures, I extract images from their original content to give them a new, personal meaning. I paint a new painting every day. These paintings are about the size of a postcard and they are studies for potential larger paintings. Each painting is an experiment. The under painting is tightly rendered watercolor on paper. Over this, a layer is loosely painted in oil paint. I use this process to create visible tensions, which helps in the story or emotion I am putting forth."

Peter Sack discovered drawing when his father taught him to draw faces and human figures. As a young boy, he drew baseball and football players for fun, combining his interest in drawing with his love of sports. When Sack was 14, his father took a watercolor class and then passed his interest and knowledge on to his son. Sack continued to paint watercolors of sports figures until he went to college. He attended East Carolina University and received a BFA in painting in 1998. Because there were no watercolor courses at ECU, Sack focused on oil paints and did not return to watercolors until years later when, in a rut, he combined his love of watercolors with his knowledge of oil painting.

Sack starts with a watercolor under painting, seals it with a clear acrylic varnish, and then applies oil paint on top of the watercolor. This allows the artist to hide the watercolor by using thicker paint or let the watercolor peek through with oil glazes. The larger pieces take one to two weeks to finish and are made by combining three or four smaller paintings onto one canvas.

Since graduating from ECU, Sack has exhibited in numerous juried, group, and solo shows in the Triangle area including shows at Litmus Gallery, Glance Gallery, Cruz Gallery, Morning Times Gallery, and Poole's Diner. He was Glance Gallery's featured artist in February 2006 and again in April 2007. He has paintings in the permanent collections of the American Institute of Healthcare and Fitness, The Borough, and Biologics, all in Raleigh. ■

Each quarter, the works of a different contemporary North Carolina artist are displayed in the storefront windows of State Bar building. The artworks enhance the exterior of our building and provide visual interest to pedestrians passing by on Fayetteville Street. The State Bar is grateful to The Collectors Gallery, the artists' representative, for arranging this loan program. The Collectors Gallery is a full service gallery that represents national, regional, and North Carolina artists, and provides residential and commercial consulting. Readers who want to know more about an artist may contact Rory Parnell or Megg Rader at TCG, 323 Blake Street, Raleigh, NC 27601 (919.828.6500).

Being Your Own Olympian

BY DON CARROLL

Many of us had the chance to watch some of the Summer Olympics last year. Some of us are already gearing up for the 2010 Winter Olympics Vancouver. The Olympics occur infrequently enough that we are compelled to watch by the special nature of the event, and often also because of an interest in the country in which the Olympics are occurring.

Who was your favorite Olympian in Beijing? Each event tends to attract individuals with certain personalities, and we all tend to be attracted to different athletes. Maybe you were touched by the interview with Kobe Bryant about what it meant to wear the USA jersey and how, after he was given his Olympic team basketball outfit, he just stared at the jersey in pride and awe. Or maybe you were pulled into watching Shawn Johnson who just kept smiling no matter what. Or perhaps you were more compelled by the performance of Nastia Liukin and her artistic, willowy determination.

The big star of course was Michael Phelps in his miraculous quest for eight gold medals. There was the excitement of his history making .01 second victory. But in addition to that, there was a sense of Michael Phelps living in the front row of his life. This was just as apparent in the face of his mother, Debbie Phelps, when the camera panned to her while everyone waited for the times to be posted. And then there was Dara Torres lining up at the swimming pool between competitors who were less than half her age. In an interview, she attributed her success to the people who trained her. She saw her individual competition as a true team sport. And then there were the blazing races of Usain Bolt, the fastest man in the world.

Since childhood we are drawn to figures who serve as heroes in our lives. There are countless children who want to grow up to be another Michael Jordan. But this process of projection which helps us grow into who we are does not end when we become adults. We continue to be attracted to people who have positive qualities that are underdeveloped in ourselves, just as we tend to be repelled by people who have negative qualities that are repressed in ourselves.

So our challenge is to be sufficiently aware of what both pulls us toward and pushes us away from other people. In this way we can grow toward those positive attributes in ourselves that need bringing to life, and not repress those negative parts of ourselves that may need to be brought to the surface in order to have their energy dissipated.

Hundreds of years ago the merchants of Venice became wealthy by discovering the secret of how to make mirrors. This might have been the first trade secret to actually remain secret for many years. Imagine the astonishment one would have felt hundreds of years ago upon being handed a Venetian mirror and seeing the physical self clearly for the first time. Today there are many opportunities to use other people as mirrors to see another deeper dimension of who we are and what we long to become. While these mirrors are around us all the time, the Olympics give us these larger-than-life Venetian mirrors and the opportunity to see aspects of ourselves for the first time.

FRIENDS PALS

The Olympics offer us several lessons in how to grow to our fuller humanity. All of these wonderful athletes seem to have been born with great natural ability, but their success is dependent on their commitment to a discipline that hones their skills.

How do we have the discipline to achieve a goal in our lives? What these Olympic athletes teach us is that discipline grows from one's ability to experience the emotional payoff of success on a small scale and then defer that pay off. For many athletes in the Olympics that pay off is deferred for many years while getting ready for the Olympics. The difficulty for us is starting a new habit; the incentive comes at the end, not when we start. For example, say I want to get in shape by losing weight and going to the gym. Until I experience the emotional feelings of well being from being in shape, I have little motivation to keep me going. In other words, if I approach getting in shape from the point of view of "*I better not eat this piece of chocolate pie,*" then I am approaching the issue from a place of deprivation. It is a perspective that leads to self pity and not to a successful outcome. If, on the other hand, I approach getting in shape from the standpoint of being able to recall the experience of how good it feels to be in shape, then it is much easier to eat a healthy diet. I get to my goal from a positive emotional experience, not through deprivation.

What this teaches us is that to create any new habit or positive perspective in our lives we

must first go through a period where we do not have the positive emotional reinforcement of being successful. This is why in recovery from cancer, addictive disease, diabetes, or many other disorders that are chronic in nature, the ability to be a part of a support group to help us bridge the gap, until we have the positive experiences of success, can be crucial.

Here is another lesson about how new healthy patterns get created. As lawyers, we have the ability to know in our head that something needs to be done. But that knowledge does not in and of itself provide the motivation to get it done. Motivation comes from the emotional experience of success. We have to find some way to bridge the gap for the pattern to begin to take shape before a reinforcing success is achieved. Again, the lesson here is you may not want to set your goals too high initially so that you can begin to experience some early success. Dara Torres talked about training for the Beijing Olympics for two years, and that her experience of training for two years was much more beneficial than just training for one year as she had for an earlier Olympics. By being stretched out over a longer period of time, her goals, and the reinforcement of her training success, became much more doable and enjoyable.

A corollary lesson is that things usually get better when we stop thinking and start doing something. The wisdom of 12-step programs is that you do not think yourself into new action, but you act yourself into new thinking. You take new action because people who care about you give you good advice and you follow through on that advice until such times as you experience the emotional benefits of your action. Then your further success builds on your earlier success.

Another characteristic of some of the Olympic athletes was their humility. They were excited and proud about their own ability to perform in their sport, but many of them talked most excitedly about being honored to represent their country at the Olympics and how lucky they felt to be there. Somehow when skill is anchored in humility, the ability of an athlete, or anyone, to perform is enhanced. Similarly, all of us need to feel good about our abilities as lawyers, but if we become prideful then we risk losing the kind of direct, straightforward authenticity that enables us to be most effective.

Once we figure out which Olympic athlete we are most attracted to, we can then get a sense of what our basic personality predisposition is and how it may move us more into our own lives. We may also become more aware of what is preventing us from stepping into our Olympic greatness. For some of us that will be not trusting that we can actually figure out what we want. If you can't figure out what your desire in life is about, then a lack of clarity is a sure way to be stymied.

Another defense is the stuck defense. Being stuck is a kind of apathy. It is the defense that keeps one from being able to risk. On the other end of the spectrum is the defense of busyness. In this scenario one gets so caught up in doing things that there is not time to feel and appreciate what one really wants. Another contrasting defense is the person who moves into the observer role in their life. This is not Debbie Phelps. This defense comes from a fear of being overwhelmed by life and, therefore, holding back. And finally, another common defense among lawyers is the helping defense. This is a focus on helping others to such an extent that one avoids feeling and knowing what one really desires. This is not real altruism, but a defense that leads to burnout.

Good mental health is the product of 1) having desire and passion in your life like an Olympic athlete, 2) being committed to a discipline that will help you achieve your goals, and 3) having the humility to know that the process is more important than any particular accomplishment and that we must have an awareness of the defenses we use to prevent ourselves from being fully engaged in our own lives. Good mental health is built on the paradox of being fully engaged in your life, but not taking it too seriously. Vancouver is just around the corner.

Good luck on the quest for your own gold medal. ■

The Lawyer Assistance Program is a confidential program of assistance for all North Carolina lawyers which helps lawyers address problems of stress, depression, addiction, or other problems that may lead to impairing a lawyer's ability to practice. If you are a lawyer, judge, or law student and would like more information, go to www.nclap.org or call toll free: Don Carroll (Charlotte and areas West) at 1-800-720-7257, Towanda Garner (Piedmont area) at 1-877-570-0991, or Ed Ward (Raleigh and down East) at 1-877-627-3743. Don is the author of A Lawyer's Guide to Healing *published by Hazelden.*

Specialization (cont.)

McGill: In addition, many sociological studies have shown that lawyers who represent corporate clients tend to have higher levels of recognition and prestige than lawyers working for individual clients. The areas that the State Bar recognizes for specialty certification are all areas that are central to the lives of those affected, many of whom are disadvantaged by not having the resources to find good counsel. The certification program is a fantastic recognition tool for many attorneys who have dedicated their careers to helping people in very unfortunate circumstances, but who may not receive a great deal of financial reward or outside recognition for their work.

Q: How do you see the future of specialization?

McGill: We anticipate more and more specialists in various practice areas. Few lawyers these days are general practitioners. Most specialize in one or two areas. It is very nice to see that the Bar recognizes that fact and has put in place a program to set standards for specialization.

Q: In what other areas would you like to see certification offered?

Noble: Certification for personal injury law would provide a wonderful service to consumers. And with recent regulatory changes facilitating greater attorney involvement at the administrative level, veterans' law might be a good area to add at some point in the future.

Q: What would you say to encourage other lawyers to pursue certification?

McGill: There are no downsides to pursuing certification, and there are quite a few benefits, including the increased opportunities for marketing. The exam preparation is over in a few weeks. The process of studying your practice area only adds to your knowledge, and you end up being a better lawyer. ■

For more information on the State Bar's specialization programs, please visit us on the web at www.nclawspecialists.gov.

Lawyers Receive Professional Discipline

Disbarments

Roger S. Cardinal of Charlotte surrendered his law license and was disbarred by the Wake County Superior Court. Cardinal misappropriated at least $350,000 in entrusted funds.

David J. Ferris Jr. of Raleigh surrendered his law license and was disbarred by the State Bar Council. Ferris was an undisclosed investor in and closed numerous fraudulent real estate transactions.

Amy Robinson of Rolesville surrendered her law license and was disbarred by the Disciplinary Hearing Commission. Robinson facilitated numerous fraudulent real estate transactions by making false representations on HUD-1 Settlement Statements.

Kevin Strickland of Burgaw surrendered his law license and was disbarred by the Wake County Superior Court. Strickland misappropriated client funds totaling at least $1,623,832.60.

Suspensions & Stayed Suspensions

Susan Hyatt of Fayetteville failed to supervise two different assistants at different times, enabling one assistant to engage in mortgage fraud and another assistant to misappropriate funds from Hyatt's trust account. The Disciplinary Hearing Commission suspended Hyatt for three years. The suspension is stayed for three years on numerous conditions.

Matthew Marino of Matthews has been suspended on an interim basis following his guilty plea in New York Federal Court to misprision of a felony. A DHC case is pending.

Morehead City lawyer **Grey Holland McCormick** has been suspended on an interim basis. McCormick was convicted of the felony of manufacturing, selling, delivering, or possessing a controlled substance with intent to manufacture, sell, or deliver and of the misdemeanor of maintaining a place for use, keeping, or sale of a controlled substance. A DHC case is pending.

Ivan N. Walters of South Carolina has been suspended on an interim basis. Walters, who closed loans for a fraudulent real estate enterprise, was convicted of misprison of felony in federal court for concealing and failing to report his client's bank fraud. A DHC case is pending.

Benson lawyer **Sherry Morris** was suspended for two years. The suspension is stayed for two years. Morris testified falsely at a hearing for another applicant before the Board of Law Examiners.

Gastonia lawyer **James Parker** was suspended for one year, stayed for four years on numerous conditions. Parker was convicted in Gaston County District Court of shoplifting/concealment charges.

In April 2006, the DHC suspended **Frederick Pierce** of Raleigh for two years for neglecting and failing to communicate with clients, failing to refund unearned fees, failing to participate in a fee dispute, settling a malpractice claim with an unrepresented client, and falsely representing that a client's case had been resolved. That suspension was stayed on numerous conditions. Pierce violated the conditions of the stay. In December 2008, the DHC activated 18 months of the two year suspension. In a separate case, the DHC found that Pierce neglected clients and failed to participate in a fee dispute and suspended Pierce for four years. Pierce can apply for a stay of the balance of the second suspension after 18 months.

The DHC suspended **Scott Spransy** of Charlotte for six months, stayed for three years on numerous conditions. Spransy neglected several clients, failed to respond to the 26th Judicial District Bar Grievance Committee, and failed to participate in good faith in the fee dispute resolution process.

Disability Inactive Status

The State Bar alleged **William L. Durham** of Winston-Salem misappropriated $3,897.62 of client funds. Before the hearing on those allegations could be held, Durham established that he was disabled and the DHC entered an order transferring him to disability inactive status. That order automatically stays the disciplinary action.

The State Bar sought to transfer Durham lawyer **Paul Pooley** to disability inactive status or, in the alternative, sought imposition of discipline for Pooley's failure to communicate with and neglect of numerous clients and failure to respond to the Grievance Committee. The DHC transferred Pooley to disability inactive status.

Censures

Steven Rader, who lives in Europe, was censured by the Grievance Committee. Rader failed to perfect his client's appeal, made a false statement in his response to the Grievance Committee, failed to make a full and fair disclosure to the Grievance Committee, and failed to protect his client's interests.

Reprimands

Tracy Barley of Durham was reprimanded by the Grievance Committee for neglecting her client's estate matter, failing to communicate with her client, failing to properly terminate representation when discharged, failing to protect her client's interests upon termination of representation, and failing to respond in a timely fashion to the Grievance Committee.

Barbara DuRant of Oxford was reprimanded by the Grievance Committee for communicating with her client's children who were represented by a Guardian Ad Litem without the GAL's knowledge or consent and for providing an incomplete response to the Grievance Committee.

Jesse Jones of Lillington was reprimanded by the Grievance Committee for communicating with the press in an attempt to influence the outcome of a criminal proceeding.

Nikita V. Mackey of Charlotte was reprimanded by the Grievance Committee for

failing to appear in court on behalf of his client, failing to adequately communicate with his client, attempting to collect an excessive fee, failing to respond to the 26th Judicial District Grievance Committee, and falsely representing that he had timely responded.

Glenn R. Page of Raleigh was reprimanded by the Grievance Committee for closing a loan in which he allowed funds due from the borrower to be provided through seller financing, contrary to the lender's instructions and without disclosing the secondary financing to the lender. The Grievance Committee considered in mitigation Page's lack of actual knowledge of the wrongdoing, the fact that Page ceased conducting real estate closings before he was contacted by the Bar, the fact that this appears to have been an isolated occurrence, and Page's remorse.

Herman Stephens of Winston-Salem was reprimanded by the Grievance Committee for neglecting to draft a demand letter for his client, failing to communicate with his client, failing to respond timely to the Grievance Committee, making false or misleading statements in his response to the Grievance Committee, and failing to respond to a fee dispute.

Stephen J. Batten of Pearl, Mississippi, was reprimanded by the Grievance Committee for failing to deposit filing fees into his trust account, failing to complete legal services for which he was retained, and failing to refund unearned fees.

Scott Spransy of Charlotte was reprimanded by the Grievance Committee for failing to adequately supervise his legal assistant, failing to provide legal services for which he was retained, and failing to communicate with his client.

Petitions for Reinstatement

Chloe Wellons' petition for reinstatement from disbarment was denied. Wellons of Raleigh was disbarred for misappropriating funds from her law partners.

Gene Kendall's petition for reinstatement from disbarment was denied. Kendall of Davidson was disbarred for misappropriating client funds.

Petitions for Reinstatement

On January 18, 2008, North Carolina State Bar reinstated Melvin L. Wall Jr. from a three year suspension imposed on June 10, 2004, by the DHC for multiple counts of neglect and failure to communicate with his clients. Wall had satisfied all of the conditions necessary for his reinstatement.

Notice of Intent to Seek Reinstatement

Individuals who wish to note their concurrence with or opposition to these petitions should file written notice with the secretary of the State Bar, PO Box 25908, Raleigh, NC 27611, before May 1, 2009 (60 days from publication).

In the Matter of Michael L. Yopp

Notice is hereby given that Michael L. Yopp of Dunn, North Carolina, intends to file a petition for reinstatement before the Disciplinary Hearing Commission of the NC State Bar. Yopp surrendered his law license and was disbarred July 19, 2002, for misappropriating client funds for his personal benefit, over-disbursing client funds, and failing to reconcile his trust account. ■

In Memoriam

W. F. Barnes
Charlotte

Hunter S. Barrow
Raleigh

Edwin E. Boone Jr.
Greensboro

B. I. Boyle
Charlotte

Soloman G. Cherry
Boone

Heman R. Clark
Raleigh

George C. Covington
Charlotte

David A. Craft
Asheville

Daniel R. Dixon II
Wilmington

Walter G. Edwards Jr.
Hertford

Edwin P. Friedberg
Cary

John S. Groves
Winston-Salem

Louise E. Harris
Winston-Salem

J. Douglas Hill
Durham

June D. Hurst
Salisbury

Robert E. King Jr.
Durham

Horace R. Kornegay
Greensboro

Raymond D. Large Jr.
Sylva

Kathleen G. Lee-Stevens
Matthews

C. Wayne Mabry
Albemarle

Alice E. Mazarick
Raleigh

Susan I. McCrory
Charlotte

Charlie S. McIntyre Jr.
Lumberton

John A. McMahon
Chapel Hill

Patricia T. Meador
Morrisville

Bruce N. Metz
Cary

William C. Morris Jr.
Asheville

H. E. Paschal
Wake Forest

Patricia P. Ridenhour
Greensboro

Joseph C. Travis
Charlotte

William H. Watson
Greenville

Katherine S. Wright
Salem, VA

Proposed 2009 FEO 1 Prohibits "Mining" for Metadata

Council Actions

At a meeting on January 23, 2009, the State Bar Council adopted the opinions summarized below upon the recommendation of the Ethics Committee:

2006 Formal Ethics Opinion 3

Representation in Purchase of Foreclosed Property

Opinion rules that a lawyer who represented the trustee or served as the trustee in a foreclosure proceeding at which the lender acquired the subject property may, under some circumstances, represent all parties on the closing of the sale of the property by the lender provided the lawyer concludes that his judgment will not be impaired by loyalty to the lender and there is full disclosure and informed consent.

2008 Formal Ethics Opinion 3

Assisting a Pro Se Litigant

Opinion rules a lawyer may assist a *pro se* litigant by drafting pleadings and giving advice without making an appearance in the proceeding and without disclosing or ensuring the disclosure of his assistance to the court unless required to do so by law or court order.

2008 Formal Ethics Opinion 14

Attribution When Using Written Work of Another

Opinion rules that it is not an ethical violation when a lawyer fails to attribute or obtain consent when incorporating into his own brief, contract, or pleading excerpts from a legal brief, contract, or pleading written by another lawyer and placed into the public domain.

2008 Formal Ethics Opinion 15

Civil Settlement That Includes Agreement Not to Report to Law Enforcement Authorities

Opinion rules that, provided the agreement does not constitute the criminal offense of compounding a crime, is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence, a lawyer may participate in a settlement agreement of a civil claim that includes a non-reporting provision prohibiting the plaintiff from reporting the defendant's conduct to law enforcement authorities.

2008 Formal Ethics Opinion 17

Filing a Notice of Appeal in a Court-Appointed Juvenile Case

Opinion rules that a lawyer appointed to represent a parent at the trial of a juvenile case may file a notice of appeal to preserve the client's right to appeal although the lawyer does not believe that the appeal has merit.

Ethics Committee Actions

At its meeting on January 22, 2009, the Ethics Committee voted to send the following proposed opinions to subcommittees for further study: Proposed 2008 FEO 13, *Audit of Real Estate Trust Account by Title Insurer*, and Proposed 2008 FEO 16, *Advising Client About Litigation Funding Agreements*. Due to an oversight, the committee did not vote on whether to recommend the adoption of Proposed 2008 FEO 12, *Initiating Foreclosure Proceedings Against a Client*, to the council; the committee will be asked to do so at its April meeting. One proposed opinion, previously published in the *Journal*, was revised and appears below. Five new proposed opinions are also published for comment. The comments of readers are welcomed.

Proposed 2008 Formal Ethics Opinion 11
Representation of Beneficiary on Other Matters While Serving as Foreclosure Trustee
January 22, 2009

Proposed opinion rules that a lawyer may not serve as the trustee in a contested foreclosure proceeding while simultaneously representing the beneficiary of the deed of trust on unrelated matters; however, the remaining lawyers in the firm may continue to represent the beneficiary on unrelated matters.

Inquiry #1:

Attorney A is employed by Law Firm. The lawyers of the firm routinely represent various bank clients including Bank Z. Bank Z is one of the firm's largest clients and all of the lawyers in the firm perform some work for the bank.

Attorney A has been asked to serve as the substitute trustee for the foreclosure of a deed of trust securing a loan (the Loan) made by Bank Z to the grantor (the Borrower) of the deed of trust. Bank Z is the named beneficiary of the deed of trust. The lawyers at the firm did not represent Bank Z on the negotiation or securitization of the Loan. The lawyers have not previously represented the Borrower.

Attorney A and the other lawyers in Law Firm want to continue to represent Bank Z on unrelated legal matters throughout the course of the foreclosure proceeding. Bank Z does not object. Borrower has not been notified that Attorney A and the other lawyers of the firm represent Bank Z on other unrelated matters.

May Attorney A continue to represent Bank Z on matters unrelated to the Loan and serve as substitute trustee for the foreclosure?

Opinion #1:

If the proceeding is contested, Attorney A may not serve as trustee and continue to represent the bank on other matters because his impartiality as trustee will be impaired by his duty of loyalty to and advocacy for the bank on the other matters. If the proceeding is not contested, however, Attorney A may serve as trustee and continue to represent the bank on other matters.

A foreclosure proceeding is contested when the grantor seeks to enjoin the proceeding or contests any of the following issues at the foreclosure hearing: jurisdiction, service of process, debt, default, notice, power of sale, and, in the case of residential mortgages, certification regarding subprime loans.[1] A borrower's motion to continue the proceeding or request to postpone the sale does not render the foreclosure contested. As with the trustee's own motion for a continuance or decision to postpone, these are procedural matters to which the trustee may respond within his or her discretion without impairing his or her ability to foreclose on the property consistent with the statutory requirements and the deed of trust.

There are a number of ethics opinions that hold that a lawyer serving as trustee in a con-

tested foreclosure proceeding may not act as the advocate for the beneficiary or the grantor in an adversarial proceeding arising from or connected with the deed of trust because the trustee is a fiduciary and, when exercising his discretion in the foreclosure, must play an impartial role relative to both parties. RPC 3, RPC 64, RPC 82, RPC 90, 04 Formal Ethics Opinion 3. None of the ethics opinions, however, consider whether a lawyer is disqualified from serving as trustee if he continues to represent the lender on unrelated legal matters.

RPC 3, which rules that a lawyer may serve as a foreclosure trustee after representing the beneficiary of the deed of trust in the negotiation of the loan, explains the basis for prohibiting the lawyer from acting as an advocate in a contested foreclosure proceeding in the following passage:

> [T]he Trustee owes a duty of impartiality to both parties which is inconsistent with representing one of the parties in a contested proceeding....Generally, when an attorney is required to withdraw from representation or from a fiduciary role, it is either because of concerns [for the] confidences of the client under Rule 4 [now Rule 1.6] and its predecessors or because of conflicts of interest under Rule 5.1 [now Rule 1.7] or its predecessors where the attorney would be put in the position of inconsistent roles or obligations at the same time or in the same proceeding. Since neither of those circumstances exist, and the rules do not appear to be directly relevant by their terms or with regard to their purposes, Attorney A is not ethically prohibited from continuing to serve as Trustee in a contested foreclosure matter, despite his prior representation of [beneficiary of the deed of trust], where he does not currently represent [beneficiary] in the foreclosure or related proceedings.

If Attorney A represents Bank Z in other matters and the foreclosure is contested, Attorney A's roles and obligations will be inconsistent. On the one hand, Attorney A is required to protect and advance the interests of the bank and, on the other hand, he has a duty to be impartial in a contested proceeding where a substantial interest of the bank is at stake. Attorney A must decide whether to continue to represent the bank on unrelated matters and relinquish the trustee role to someone who will not be similarly compromised or to fulfill the role of trustee by withdrawing from the representation of the bank in all other matters. *See also* Rule 1.7(a)(1)(concurrent conflict of interest exists if representation of one or more clients may be materially limited by the lawyer's responsibilities to a third person).

Inquiry #2:

Attorney A withdraws from the representation of Bank Z on all matters. Are the other lawyers in Law Firm required to withdraw from the representation of Bank Z on matters unrelated to the Loan if Attorney A serves as the substitute trustee for the contested foreclosure?

Opinion #2:

No, the other lawyers in the firm may continue to represent Bank Z on unrelated matters.

Rule 1.10(a) provides that a disqualification based upon a personal interest of a lawyer that does not present a significant risk of materially limiting the representation of a client by the remaining lawyers in a firm is not imputed to the remaining lawyers in the firm. Comment [3] to Rule 1.10 specifies that "[t]he rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented." Serving in the role of trustee does not raise questions of client loyalty or protection of confidential information because the lawyer/trustee does not represent either party in the foreclosure. Therefore, Attorney A's disqualification from the representation of Bank Z to maintain his impartiality is not imputed to the other lawyers in the firm who are representing the bank on matters unrelated to the Loan and the foreclosure.

Inquiry #3:

Attorney B, another lawyer in Law Firm, intends to act as the lawyer for Bank Z in connection with the Loan including representation in the foreclosure proceeding. May Attorney B represent Bank Z on all matters related to the Loan, including the foreclosure, if another lawyer in his firm is serving as the trustee?

Opinion #3:

No, if the foreclosure is contested, Attorney B may not represent Bank Z at the foreclosure proceeding or on any matter related to the Loan. Attorney A's impartiality may be impaired if another lawyer from his firm appears in the foreclosure or related matters on behalf of the bank. To preserve the integrity of the process and the impartiality of the trustee, Attorney A's disqualification from serving as an advocate for one of the parties to a contested foreclosure in any matter related to the Loan is imputed to the other lawyers in the firm. *See* Rule 1.10(a).

Inquiry #4:

May another lawyer in the firm represent Attorney A in his capacity as trustee for the foreclosure?

Opinion #4:

Yes. However, if the foreclosure is contested, the lawyer may not continue to do unrelated legal work for the bank while represent-

Rules, Procedure, Comments

All opinions of the Ethics Committee are predicated upon the Rules of Professional Conduct as revised effective March 1, 2003, and thereafter amended, and referred to herein as the Rules of Professional Conduct (2003). The proposed opinions are issued pursuant to the "Procedures for Ruling on Questions of Legal Ethics." 27 N.C.A.C. ID, Sect .0100. Any interested person or group may submit a written comment or request to be heard concerning a proposed opinion. Any comment or request should be directed to the Ethics Committee at PO Box 25908, Raleigh, NC 27611, prior to the next meeting of the committee in April 2009.

Captions and Headnotes

A caption and a short description of each of the proposed opinions precedes the statement of the inquiry. The captions and descriptions are provided as research aids and are not official statements of the Ethics Committee or the council.

Public Information

The Ethics Committee's meetings are public, and materials submitted for consideration are generally NOT held in confidence. Persons submitting requests for advice are cautioned that inquiries should not disclose client confidences or sensitive information that is not necessary to the resolution of the ethical questions presented.

ing Attorney A as trustee. If the lawyer serving as trustee must avoid the appearance of bias by foregoing representation of the bank in unrelated matters, his or her lawyer must do the same. *See* Rule 1.10(a).

Inquiry #5:

Law Firm has set up a separate company, Firmco, LLC, to serve as trustee on deeds of trust. Firmco is substituted as trustee on the deed of trust securing the Loan made by Bank Z. May a lawyer in the firm represent Firmco in its capacity as trustee for the foreclosure?

Opinion #5:

Yes. However, if the foreclosure is contested, the lawyer representing Firmco may not continue to do unrelated legal work for the bank. *See* opinion #4.

Inquiry #6:

Should the Borrower be informed that the other lawyers in Law Firm will continue to represent Bank Z on matters unrelated to the foreclosure?

Opinion #6:

Yes. The role of the trustee in a foreclosure proceeding is similar to the roles of arbitrator or mediator which are addressed in Rule 2.4. Rule 2.4(b) provides that when a lawyer serving as a third-party neutral knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client. Similarly, explaining the role of the trustee and the role of the other lawyers in the firm (who continue to represent the bank) to a borrower in a foreclosure proceeding will help to avoid confusion and will allow the borrower to pursue his legal remedies to remove the trustee if he objects.

Inquiry #7:

If Borrower informally objects to Attorney A serving as the trustee because the other lawyers in the firm represent Bank Z on unrelated matters, is Attorney A required to withdraw from service as trustee?

Opinion #7:

No, Attorney A is not required to withdraw unless ordered to do so by a court. *See* Opinion #2 above.

Inquiry #8:

Do the responses to any of the preceding inquiries change if Bank Z is not one of the largest clients of Law Firm?

Opinion #8:

No.

Endnote

1. G.S. §45-105 allows the Commissioner of Banks (COB) to delay the time within which a lender can file a foreclosure proceeding on a subprime loan for a period of up to 30 days and to suspend a foreclosure on a subprime loan based upon its review of loan information that the lender must file with the Administrative Office of the Courts pursuant to G.S. §45-103. The clerk of court must find that the loan is not subprime or, if subprime, that the COB has not delayed the time for filing the foreclosure proceeding or suspended the foreclosure based its review of the loan information.

Proposed 2009 Formal Ethics Opinion 1
Review and Use of Metadata
January 22, 2009

Proposed opinion rules that a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document.

Background:

In the representation of clients in all types of legal matters, lawyers routinely send e-mails and electronic documents, spreadsheets, and PowerPoint presentations to a lawyer for another party (or to the party if not represented by counsel). The e-mail and the electronic documents contain metadata[1] or embedded information about the document describing the document's history, tracking, and management[2] such as the date and time that the document was created, the computer on which the document was created, the last date and time that a document was saved, "redlined" changes identifying what was changed or deleted in the document, and comments included in the document during the editing process. Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Opinion 2007-500, notes that, although most metadata contains "seemingly harmless information," it may also contain "privileged and/or confidential information, such as previously deleted text, notes, and tracked changes which may provide information about, e.g., legal issues, legal theories, and other information that was not intended to be disclosed to opposing counsel." This embedded information may be readily revealed by a "right click" with a computer mouse, by clicking on a software icon, or by using software designed to discover and disclose the metadata.[3] The sender of the document may be unaware that there is metadata embedded in the document or mistakenly believe that the metadata was deleted from the document prior to transmission. The Ethics Committee is issuing this opinion *sua sponte* in light of the importance of the ethical issues raised by metadata.

Inquiry #1:

What is the ethical duty of a lawyer who sends an electronic communication to prevent the disclosure of a client's confidential information found in metadata?

Opinion #1:

Rule 1.6(a) of the Rules of Professional Conduct prohibits a lawyer from revealing information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by one of the exceptions to confidentiality set forth in paragraph (b) of the rule. As noted in comment [20] to the rule, "[w]hen transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." Therefore, a lawyer who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including

information in metadata, to unintended recipients.[4]

RPC 215 addressed the preservation of confidential client information when using modern forms of communication including cellular phones and e-mail. The opinion states that the professional obligation to use reasonable care to protect and preserve confidential information extends to the use of communications technology; "[h]owever, this obligation does not require that a lawyer use only infallibly secure methods of communication." Nevertheless, "a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication."

What is reasonable depends upon the circumstances including, for example, the sensitivity of the confidential information that may be disclosed, the potential adverse consequences from disclosure, any special instructions or expectations of a client, and the steps that the lawyer takes to prevent the disclosure of metadata.[5] Of course, when electronic communications are produced in response to a subpoena or a formal discovery request in civil litigation, the responding lawyer may not remove or restrict access to the metadata in the communications if doing so would violate any disclosure duties under law, the Rules of Civil Procedure, or court order.

Inquiry #2:

May a lawyer who receives an electronic communication from another party or the party's lawyer search for and use metadata embedded in the communication without the consent of the other party or lawyer?

Opinion #2:

No. The information revealed, whether trivial or significant, is confidential information of another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Moreover, because the sending lawyer (or the other party if unrepresented) trusts the receiving lawyer to read only the information that is readily visible on the document, a lawyer who takes steps to reveal embedded information is engaged in dishonest conduct in violation of Rule 8.4(c) and (d) which prohibit conduct "involving dishonesty, fraud, deceit, or misrepresentation" and that is "prejudicial to the administration of justice."

The New York State Bar was the first to adopt this position which was followed by the state bars of Alabama, Arizona, Florida, and Maine.[6] New York Ethics Opinion 749 holds that:

> in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine, or that may otherwise constitute a "secret" of another lawyer's client would violate the letter and spirit of [the New York] Disciplinary Rules.

Agreeing with the position of the New York State Bar, the Alabama State Bar Disciplinary Commission in Opinion 2007-02 finds that, "[t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party." Although the ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 06-442 (2006),[7] takes the position that the Model Rules of Professional Conduct do not prohibit a lawyer from reviewing and using metadata, this position was subsequently rejected by the State Bar of Arizona among others. Arizona Opinion 07-03 observes that under the ABA opinion, which puts "the sending lawyer…at the mercy of the recipient lawyer…, the sending lawyer might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely…[this is not] realistic or necessary." The North Carolina State Bar Ethics Committee agrees.

Rule 4.4(b) concerns the receipt of a writing that was never intended for the receiving lawyer and it does not, therefore, address the ethical issues raised by the search for and use of metadata. Rule 4.4(b) requires a lawyer who receives a writing relating to the representation of a client that the lawyer knows, or reasonably should know, was inadvertently sent, to promptly notify the sender. However, the rule does not prohibit the receiving lawyer from reading the document and, as noted in the comment to the rule, "[w]hether the lawyer who receives the writing is required to take additional steps, such as returning the original writing, is a matter of law beyond the scope of these rules….Whether a lawyer is required [to return a writing unread] is [also] a matter of law." A lawyer who receives an inadvertently sent document must read the document to determine its purpose and character and cannot know that the document was inadvertently sent without doing so. The lawyer is a passive recipient of the document and is not actively attempting to unveil the other party's confidences. Conversely, a lawyer who receives an electronic communication knows that the sender intends to disclose only the information visible on the face of the communication unless the lawyer has an agreement to the contrary with the sender. Therefore, a lawyer who purposefully searches for and uses the information contained in metadata in a communication received from another lawyer or party is engaged in dishonest and unethical conduct that betrays the trust of the other lawyer or party and undermines that lawyer's confidential relationship with his or her client.

In conclusion, a lawyer may not search for and use metadata in an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.

Endnotes

1. Metadata is explained in Pennsylvania Bar Ass'n. Comm. on Legal Ethics and Professional Responsibility, Formal Op. 2007-500 (2007), as follows: "Metadata, which means 'information about data,' is data contained within electronic materials that is not ordinarily visible to those viewing the information. Although most commonly found in documents created in Microsoft Word, metadata is also present in a variety of other formats, including spreadsheets, PowerPoint presentations, and Corel WordPerfect documents."
2. Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007).
3. Pennsylvania Formal Op. 2007-500 (2007).
4. This is the consensus position of the jurisdictions that have considered the issue as well as the ABA Standing Committee on Ethics and Professional Responsibility. Alabama State Bar Disciplinary Comm'n, Op. 2007-02 (2007); Arizona State Bar Comm. on the Rules of Professional Conduct, Op. 07-03 (2007); Colorado Bar Ass'n. Ethics Comm., Op. 119 (2008); District of Columbia Legal Ethics Comm., Op. 341 (2007); Florida Professional Ethics Comm., Ethics Op. 06-2 (2006); Maine Bd. of Bar Overseers Professional Ethics Comm'n., Op. 196 (2008); Maryland State Bar Ass'n. Comm. on Ethics, Op. 2007-09 (2006); New York State Ethics Op. 782 (2004); Pennsylvania Formal Op. 2007-500 (2007); ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 06-442 (Aug. 5, 2006).

5. Steps to minimize the risk of disclosure of metadata include the following:

- Avoiding the use of the redlining function of a word processing program.
- Not embedding comments in a document.
- Not using template documents that may include embedded information about clients for whom a lawyer previously used the template.
- Using computer programs to "scrub" the document of embedded information before sending.
- Sending a version of the document that does not include embedded information such as a hard copy, a scanned image, or a fax.
- Negotiating a confidentiality agreement or protective order that will allow embedded information to be kept out of evidence.

See opinions listed in footnote 4 *supra.*

6. Alabama Ethics Op. 2007-02 (2007); Arizona Op. 07-03 (2007); Florida Ethics Op. 06-2 (2006); Maine Op. 196 (Oct. 21, 2008), and New York Ethics Op. 749 (2001). Pennsylvania Formal Op. 2007-500 (2007) holds that a lawyer must determine for himself or herself whether to utilize metadata based upon the lawyer's judgment and the particular factual situation. District of Columbia Legal Ethics Comm., Op. 341 (2007) holds that a lawyer may not view metadata if the lawyer has actual knowledge that it was provided inadvertently.

7. ABA Formal Op. 06-442 (2006) concludes that the Model Rules of Professional Conduct permit a lawyer to review and use metadata contained in e-mail and other electronic documents. The Colorado Bar Association and the Maryland State Bar Association agree with the position expressed in the ABA opinion. Colorado Op. 119 (2008); Maryland Op. 2007-09 (2006).

Proposed 2009 Formal Ethics Opinion 2
Responding to Unauthorized Practice of Law in Preparation of a Deed
January 22, 2009

Proposed opinion rules a closing lawyer who reasonably believes that a title company engaged in the unauthorized practice of law when preparing a deed must report the lawyer who assisted the title company but may close the transaction if client consents and doing so is in the client's interest.

Inquiry #1:

Buyer/borrower's counsel is preparing for closing. The day prior to closing a draft of a deed is forwarded to buyer/borrower's counsel by ABC Title Company. At or near the top of the draft deed it states in writing, "This deed was prepared by ABC Title Company under the supervision of John Doe, attorney at law." ABC Title Company is not a bank or a law firm. John Doe is not employed by ABC Title Company. Buyer/borrower's counsel believes that the deed is actually being prepared by a nonlawyer employee or independent contractor of the ABC Title Company who then forwards the deed to John Doe for his review and approval. John Doe does not directly employ the nonlegal staff person who prepares the deed, nor is that person an independent contractor hired by John Doe for the purpose of assisting John Doe with the legal work he performs on behalf of his clients.

What are the ethical obligations of buyer/borrower's counsel as to John Doe and ABC Title Company?

Opinion #1:

No opinion is expressed on the legal question of whether ABC Title Company is engaged in the unauthorized practice of law. For the purpose of responding to this inquiry, however, it is assumed that buyer/borrower's counsel reasonably believes that ABC is engaged in the unauthorized practice of law.

Rule 8.3(a) requires a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, to inform the North Carolina State Bar or a court having jurisdiction over the matter. Rule 8.3 only requires a lawyer to report rule violations of "another lawyer." There is no requirement under Rule 8.3 to report the unauthorized practice of law by a nonlawyer or company. Nevertheless, Rule 5.5(d) of the Rules of Professional Conduct prohibits a lawyer from assisting another person in the unauthorized practice of law.

If buyer/borrower's counsel suspects that John Doe is assisting ABC Title Company in the unauthorized practice of law, he should communicate his concerns to John Doe and advise John Doe that he may wish to contact the State Bar for an ethics opinion as to his future transactions with ABC Title Company. If, after communicating with John Doe, buyer/borrower's counsel reasonably believes that John Doe is knowingly assisting the title company in the unauthorized practice of law, and plans to continue participating in such conduct, buyer/borrower's counsel must report John Doe to the State Bar. Rule 8.3(a).

Inquiry #2:

May buyer/borrower's counsel proceed with the closing?

Opinion #2:

Buyer/borrower's counsel has an obligation to do what is in the best interest of his client while not assisting in the unauthorized practice of law. The lawyer should advise the client of his concerns about ABC's unauthorized practice of law and any harm that such conduct may pose to the client. However, if buyer/borrower's counsel determines that the deed appears to convey marketable title and the client decides to proceed with the closing after receiving his lawyer's advice, buyer/borrower's counsel may close the transaction. *See* 2007 FEO 3 (lawyer may proceed with representation of city council in quasi-judicial proceeding after advising the council of the legal implications of a nonlawyer appearing before the council in representative capacity). Buyer/borrower's participation in the closing does not further the unauthorized practice of law by ABC Title Company.

Proposed 2009 Formal Ethics Opinion 3
Nonlawyer Employee Contacting Clients of Former Employer
January 22, 2009

Proposed opinion rules that a nonlawyer employee of a firm may write to clients of the nonlawyer's former employer provided the communications comply with Rule 7.3.

Inquiry:

May a nonlawyer employee of a law firm, who recently changed law firms, write to clients of his/her former employer with whom the nonlawyer had established relationships to inform the clients that the nonlawyer is employed with a new law firm and that the new law firm handles the same type of cases?

Opinion:

Yes. First, it should be noted that the Rules of Professional Conduct govern the actions of lawyers, rather than nonlawyers. However, a supervising lawyer may be responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer. *See* Rule 5.3(c).

The lawyer who currently supervises the nonlawyer would not be prohibited under the Rules of Professional Conduct from writing to the clients of another law firm, so long as the written communication complies with the advertising rules, Rules 7.1 to 7.5. Rule 7.3(c) requires the inclusion of an "advertising notice" when the written communication is for the purpose of soliciting the business of a potential client known to be in need of legal services in a particular matter. Rule 4.2, which

addresses communications with persons represented by counsel, is not applicable to the current scenario because Rule 4.2 applies only when the lawyer communicating with the represented person also represents a client in the particular matter. *See* Rule 4.2, cmt. [2].

Therefore, the lawyer who employs/supervises the nonlawyer is not in violation of the Rules of Professional Conduct if he/she permits the nonlawyer to write to clients of the nonlawyer's former employer provided the advertising notice is included in any letter to a client of the former firm known to be in need of legal services in a particular matter. In addition, the lawyer may not share legal fees with a nonlawyer and, therefore, may not compensate the nonlawyer for bringing clients to the lawyer's law firm. *See* Rule 5.4. The employing lawyer must also insure that the nonlawyer preserves the confidentiality of information of her former employer's clients. *See* RPC 176 and Rules 1.6, 1.9.

No opinion is expressed on the legal question of whether a communication with a client of the nonlawyer's former employer constitutes interference with a contract.

Proposed 2009 Formal Ethics Opinion 4
Credit Card Account that Avoids Commingling
January 22, 2009

Proposed opinion rules that a law firm may establish a credit card account that avoids commingling by depositing unearned fees into the law firm's trust account and earned fees into the law firm's operating account provided the problem of chargebacks is addressed.

Inquiry:

To avoid the commingling of client funds with a lawyer's own funds, Rule 1.15-2 of the Rules of Professional Conduct requires payments of mixed funds, unearned fees, and money advanced for costs to be deposited into a lawyer's trust account, and payments for earned fees and reimbursements for expenses advanced by a lawyer to be deposited into a lawyer's operating account. Although a lawyer may accept payment of legal fees by credit card, if there is no way to distinguish a credit card payment for earned fees or costs advanced from a payment for unearned fees or anticipated expenses, all credit card payments must be initially deposited into the lawyer's trust account. Earned fees and expense reimbursements are then withdrawn promptly from the trust account for deposit into the operating account or payment to the lawyer. CPR 129 and RPC 247.

A bank[1] has developed a credit card account specifically for law firms that separates and deposits payments of unearned and earned client funds into trust and operating accounts as appropriate. Payments for unearned fees (and for anticipated expenses) are deposited directly into the participating law firm's trust account and payments for earned fees (and costs advanced) are deposited directly into the firm's operating account. May a lawyer establish such an account?

Opinion:

Yes, the account satisfies a lawyer's professional responsibility to avoid the commingling of funds. Utilization of such an account does not violate Rule 1.15-2(g) which requires mixed funds (funds belonging to the lawyer received in combination with funds belonging to a client) to be deposited into the lawyer's trust account intact and, after deposit, the funds belonging to the lawyer to be withdrawn. The law firm credit card account described in the inquiry separates the funds prior to their deposit and, therefore, the funds are not mixed when received by the lawyer.

A lawyer may set up such an account only if the lawyer is also able to comply with 97 FEO 9 which addresses credit card agreements that give the processing bank the authority to debit or "charge back" an account in the event a credit charge is disputed. The opinion sets forth the following alternative ways to safeguard client funds in a trust account when the credit card agreement gives the bank the authority to debit the lawyer's trust account for a chargeback by a client without prior notice to the lawyer:

> attempt to negotiate an agreement with the bank that requires the bank to debit an account other than the trust account in the event of a chargeback; maintain a separate demand deposit account in an amount sufficient to cover any chargeback; request that the bank arrange an inter-account transfer such that the lawyer's operating account will be immediately debited in the event of a chargeback against the trust account; or establish a trust account for the sole purpose of receiving advance payments by credit card which will be transferred immediately to the lawyer's primary trust account.

As noted in 97 FEO 9, "[u]nder all circumstances, a lawyer is ethically compelled to arrange for a payment (from his or her own funds or from some other source) to the trust account sufficient to cover the chargeback in the event that a chargeback jeopardizes the funds of other clients on deposit in the account." Therefore, provided the lawyer can comply with the requirements set forth in 97 FEO 9, the lawyer may establish a credit card account that deposits funds into separate accounts.

Endnote

1. One such account is the Law Firm Merchant Account™ which is offered by Affiniscape Merchant Solutions in association with Bank of America, NA.

Responsibilities When Sponsoring a Pro Hac Vice Lawyer

G.S. 84-4.1 governs the limited practice of out-of-state lawyers (pro hac vice admission).

If you are the North Carolina lawyer sponsoring an out-of-state lawyer seeking admission pro hac vice (PHV), you must file a registration statement with the NC State Bar within 30 days of the entry of the order granting PHV admission.

Additionally, as explained on the registration statement, you must notify the NC State Bar upon conclusion of the case.

The registration form and other important information about pro hac vice admission can be found in the FAQ section of our website, www.ncbar.gov.

Proposed 2009 Formal Ethics Opinion 5
Reporting Opposing Party's Citizenship Status to ICE
January 22, 2009

Proposed opinion rules that a lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law.

Inquiry #1:

Lawyer is defending a medical malpractice lawsuit in which a mother and her child are plaintiffs. The child is a natural born US

CONTINUED ON PAGE 53

Amendments Pending Approval of the Supreme Court

At its meetings on October 24, 2008, and January 23, 2009, the State Bar Council voted to adopt the following amendments for transmission to the North Carolina Supreme Court for approval (for the complete text of the proposed amendments, see the Fall 2008 and Winter 2008 editions of the *Journal* or visit the State Bar website: www.ncbar.gov):

Proposed Amendments to the Rules on Discipline and Disability

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

The proposed amendments to the discipline rules revise and replace the existing rule limiting the time period for filing grievances and provide guidelines for the Grievance Committee and for the Disciplinary Hearing Commission when imposing discipline.

Proposed Amendments to the IOLTA Rules and Rules of Professional Conduct

27 N.C.A.C. 1D, Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

27 N.C.A.C. 2, Rules of Professional Conduct, Rule 1.15, Safekeeping Property

These proposed technical amendments are necessitated by the transition from voluntary to mandatory IOLTA.

Proposed Amendments to the Regulations Governing the Administration of the CLE Program

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program, and Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

The proposed amendments clarify when a lawyer will be billed for attendee fees that are not paid by a sponsor of a program and deny CLE credit to any substantive law course taught by a disbarred lawyer unless the course is on professional responsibility (ethics).

Proposed Amendments to the Rules Governing Specialization

27 N.C.A.C. 1D, Section .1700, The Plan of Legal Specialization; Section .1800, Hearing and Appeal Rules of the Board of Legal Specialization; Section .1900, Continuing Legal Education for the Purposes of the Board of Legal Specialization; and Section .2900, Certification Standards for the Elder Law Specialty

The proposed rule amendments to Section .1700 allow a specialist to take certain CLE courses that are not in the specialty practice area or a related field. The proposed amendments to the hearing and appeal rules clarify the conditions under which an applicant may view a failed examination and limit the applicant's appeal right to re-grading of the failed examination. The proposed amendments to the rules on CLE for specialization ensure that applicants for specialization receive the same teaching credit for multiple presentations as permitted by the CLE rules for the general membership of the State Bar. Proposed Section .2900 contains the rules for a new specialty in elder law.

Proposed Amendments to the Plan for Certification of Paralegals

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

The proposed amendments allow the board's review panel to take into consideration reformation of character and other mitigating factors when determining whether an applicant will be denied certification because of a conviction of a crime. The proposed amendments also revise the review and appeal procedures when an applicant for certification fails the examination.

The Process

Proposed amendments to the Rules of the North Carolina State Bar are published for comment in the *Journal.* They are considered for adoption by the council at the succeeding quarterly meeting. If adopted, they are submitted to the North Carolina Supreme Court for approval. Amendments become effective upon approval by the court. **Unless otherwise noted, proposed additions to rules are printed in bold and underlined, deletions are interlined.**

Proposed Amendments

At its meeting on January 23, 2009, the State Bar Council voted to publish the following proposed rule amendments for comment from the members of the bar:

Proposed Amendments to the Rules on Discipline and Disability

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

The proposed amendments provide for enhanced disciplinary sanctions as a function of prior discipline. The proposed amendments were originally published in the Winter 2008 edition of the *Journal* in a pro-

posed new rule (Rule .0131). Upon reconsideration, it was determined that rewording would improve the clarity of the proposed amendments and that the proposed amendments should be placed within the two existing rules on the range of discipline that may be imposed by the Grievance Committee and by the Disciplinary Hearing Commission.

.0113 Proceedings before the Grievance Committee

(a) ....

(k) Admonitions, Reprimands, and Censures

....

~~(k)~~ (l) Effect of Prior Discipline.

(1) If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one or two prior impositions of discipline, the degree of discipline imposed in the current proceeding shall be greater than that imposed in the immediate prior proceeding unless discipline was last imposed more than six years prior to the current proceeding or the offense for which discipline was last imposed was so inconsequential that imposing greater discipline in the current proceeding would be manifestly unjust.

(2) If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of three or more prior impositions of discipline within the past six years, the degree of discipline in the current proceeding shall be no less than a suspension unless the mitigating circumstances are so compelling as to warrant a lesser degree of discipline.

(3) Rule .0115(a) and (b) notwithstanding, a record of discipline is not a prerequisite to the imposition of any appropriate form of discipline, including disbarment, as authorized by N.C. Gen. Stat. § 84-28 and Chapter 1B of these rules.

~~(l)~~ (m) Procedures for Admonitions and Reprimands

....

[Re-lettering remaining paragraphs.]

.0114 Formal Hearing

(a) ....

....

(x) Effect of Prior Discipline.

(1) If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one or two prior impositions of discipline, the degree of discipline imposed in the current proceeding shall be greater than that imposed in the immediate prior proceeding unless discipline was last imposed more than six years prior to the current proceeding or the offense for which discipline was last imposed was so inconsequential that imposing greater discipline in the current proceeding would be manifestly unjust.

(2) If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of three or more prior impositions of discipline within the past six years, the degree of discipline in the current proceeding shall be no less than a suspension unless the mitigating circumstances are so compelling as to warrant a lesser degree of discipline.

(3) Rule .0115(a) and (b) notwithstanding, a record of discipline is not a prerequisite to the imposition of any appropriate form of discipline, including disbarment, as authorized by N.C. Gen. Stat. § 84-28 and Chapter 1B of these rules.

~~(x)~~ (y) In any case ....

[Re-lettering remaining paragraphs.]

Proposed Amendments to the Discipline and Disability Rules to Change Terminology

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

Participants in the disciplinary system and observers occasionally become confused when trying to distinguish between the hearing "committees" of the Disciplinary Hearing Commission (DHC), the Commission as a whole, and the Grievance Committee. This problem is compounded by the Discipline and Disability Rules in which the phrase "hearing committee" is used to denote a three-member panel of the DHC appointed by the chair of the DHC to preside over a public hearing of a discipline or disability matter. To reduce this confusion, it is proposed that in each of the rules listed below, the word "panel" will be substituted for the word "committee" whenever the latter word is used to refer to a three-member panel of the DHC presiding over a public hearing. Because these technical amendments do not affect the substance of the rules, the rules are listed but not re-printed below. (See the title of Rule .0109 below for an example of the proposed amendment.)

Rule .0103, Definitions

Rule .0104, State Bar Council: Powers and Duties in Discipline and Disability Matters

Rule .0107, Counsel: Powers and Duties

Rule .0108, Chairperson of the Hearing Commission: Powers and Duties

Rule .0109, Hearing Panel ~~Committee~~: Powers and Duties

Rule .0110, Secretary: Powers and Duties in Discipline and Disability Matters

Rule .0114, Formal Hearing

Rule .0118, Disability Hearings

Rule .0119, Enforcement of Powers

Rule .0123, Imposition of Discipline; Finding of Incapacity or Disability; Notice to the Courts

Rule .0125, Reinstatement

Proposed Amendments to the Procedures for Administrative Suspension

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

Proposed amendments to the rules on administrative suspension for failure to timely fulfill a duty of membership (e.g., pay membership dues, complete annual CLE, return CLE annual report form, etc.) will require a lawyer who is served with an order of suspension to wind down his or her law practice within 30 days after the order goes into effect. The wind-down obligations are the same as those imposed when a lawyer

Comments

The State Bar welcomes your comments regarding proposed amendments to the rules. Please send your written comments to L. Thomas Lunsford II, The North Carolina State Bar, PO Box 25908, Raleigh, NC 27611.

receives a disciplinary suspension or is disbarred. Under the proposed amendments, if a lawyer under administrative suspension fails to fulfill the wind-down obligations, the member is subject to professional discipline.

Other proposed amendments make Rule .0904 consistent with prior amendments to Rule .0903 (approved by the Supreme Court in March 2008) that eliminate the recitation of the obligations of membership enforceable under the rule in favor of a generic reference thereto and eliminate the requirement of service pursuant to Rule 4 of the Rules of Civil Procedure in favor of service by registered or certified mail at the member's last address on record with the State Bar.

.0903 Suspension for Failure to Fulfill Obligations of Membership

(a) Procedure for Enforcement of Obligations of Membership

...

(b) Notice

Whenever it appears that a member has failed to comply, in a timely fashion, with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the secretary shall prepare a written notice directing the member to show cause, in writing, within 30 days of the date of service of the notice why he or she should not be suspended from the practice of law.

(c) Service of the Notice

The notice shall be served on the member **by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person effecting the service. Notice may also be by personal service** ~~pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served~~ by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process.

(d) Entry of Order of Suspension Upon Failure to Respond to Notice to Show Cause.

Whenever a member fails to respond in writing within 30 days of the service of the notice to show cause upon the member, and it appears that the member has failed to comply with an obligation of membership in the State Bar as established by the administrative rules of the State Bar or by statute, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. ~~A copy of the~~ **The** order shall be served on the member **by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person effecting the service. Notice may also be by personal service** ~~pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served~~ by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. **Unless the member complies with or fulfills the obligation of membership within 30 days after service of the order, the obligations of a disbarred or suspended member to wind-down the member's law practice within 30 days set forth in Rule .0124 of Subchapter 1B of these rules shall apply to the member upon the effective date of the order of suspension. If the member fails to fulfill the obligations set forth in Rule .0124 of Subchapter 1B within 30 days of the effective date of the order, the member shall be subject to professional discipline.**

(e) Procedure Upon Submission of a Timely Response to a Notice to Show Cause

(1) ...

(3) Order of Suspension

Upon the recommendation of the Administrative Committee, the council may enter an order suspending the member from the practice of law. The order shall be effective 30 days after proof of service on the member. ~~A copy of the~~ **The** order shall be served on the member **by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the member according to the records of the North Carolina State Bar or such later address as may be known to the person effecting the service. Notice may also be by personal service** ~~pursuant to Rule 4 of the North Carolina Rules of Civil Procedure and may be served~~ by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. **Unless the member complies with or fulfills the obligation of membership within 30 days after service of the order, the obligations of a disbarred or suspended member to wind down the member's law practice within 30 days set forth in Rule .0124 of Subchapter 1B of these rules shall apply to the member upon the effective date of the order of suspension. If the member fails to fulfill the obligations set forth in Rule .0124 of Subchapter 1B within 30 days of the effective date of the order, the member shall be subject to professional discipline.**

(f) Late Compliance

...

.0904 Compliance After Suspension for Failure to Fulfill Obligations of Membership ~~Pay Fees or Assessed Costs, or to File Certificate of Insurance Coverage~~

(a) Reinstatement Within 30 Days of Service of Suspension Order. A member who receives an order of suspension for **failure to comply with an obligation of membership** ~~nonpayment of the annual membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar, and/or failure to file a certificate of insurance coverage as required by Rule .0204 of Subchapter A, and/or a pro hac vice registration statement as required by Rule .0101 of subchapter H~~, may preclude the order from becoming effective by submitting a written request and satisfactory showing within 30 days after service of the suspension order **that the member has com-**

plied with or fulfilled the obligations of membership set forth in the order ~~of certification of insurance coverage, registration of pro hac vice admission, and/or payment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, assessed costs~~, and has paid the costs of the suspension and reinstatement procedure, including the costs of service. Such member shall not be required to file a formal reinstatement petition or pay a $125 reinstatement fee.

(b) Reinstatement More than 30 Days after Service of Suspension Order. At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for failure to comply with an obligation of membership ~~nonpayment of the membership fee, late fee, Client Security Fund assessment, district bar annual membership fee, and/or costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar and/or failure to file a certificate of insurance coverage, and/or file a pro hac vice registration statement~~, may petition the council for an order of reinstatement.

(c) Contents of Reinstatement Petition

The petition shall set out facts showing the following:

(1) ....

(5) that the member has filed a certificate of insurance coverage for the current year; ~~and~~

(6) that the member has filed any overdue pro hac vice registration statement for which the member was responsible, and

(7) that, during the 30 day period after the effective date of the order of suspension, the member fulfilled the obligations of a disbarred or suspended member set forth in Rule .0124 of Subchapter 1B, or that such obligations do not apply to the member due to the nature of the member's legal employment.

(d) Procedure for Review of Reinstatement Petition

...

Proposed Amendments to the Rules of Professional Conduct

27 N.C.A.C. 2, Revised Rules of Professional Conduct, Rule 0.1, Preamble; Rule 1.8, Conflict of Interest: Current Clients: Specific Rules; Rule 3.8, Special Responsibilities of a Prosecutor

The proposed amendments to the Preamble of the Rules of Professional Conduct declare that lawyers should not discriminate against anyone on the basis of race, gender, age, or other protected status or personal characteristic. The proposed amendments to Rule 1.8(e) permit lawyers to provide financial assistance to distressed litigation clients under certain circumstances. The proposed amendments to Rule 3.8 bear upon a prosecutor's responsibilities when information indicating a possible wrongful conviction comes to the prosecutor's attention.

0.1 ***Preamble: A Lawyer's Responsibilities***

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[2] ....

[5] While employed in a professional capacity, a lawyer should avoid knowingly manifesting through word or deed bias or prejudice based upon a person's race, gender, national origin, religion, age, disability, sexual orientation, marital status, or other protected status or personal characteristic. This does not, however, prohibit legitimate advocacy when such status or personal characteristic is material to the issues in a proceeding.

[6] ~~[5]~~ ...

[Re-numbering remaining paragraphs.]

Rule 1.8, ***Conflict Of Interest: Current Clients: Specific Rules***

(a) ....

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; ~~and~~

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client may provide financial assistance for essential needs such as food, rent, and utilities provided there is no obligation to repay and there was no representation to the client prior to representation that such financial assistance would be provided.

....

Comment

[1] ....

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, exceptions allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid and allowing lawyers to provide financial assistance, without expectation of repayment, to indigent clients who are in dire financial circumstances and unable to pay for essential needs such as housing, utilities, or food are ~~is~~ warranted. Moreover, it is not a violation of this Rule to provide holiday gifts or money for holiday gifts for an indigent client or the children of an indigent client if there is no obligation or expectation of repayment.

Rule 3.8, ***Special Responsibilities of a Prosecutor***

The prosecutor in a criminal case shall:

(a) ....

(g) when the prosecutor knows of new, credible, and material post-conviction evidence that a reasonable person in the position of the prosecutor would conclude casts substantial doubt on the guilt of a convicted defendant, disclose the evidence to a court or other authority, the North Carolina Innocence Inquiry Commission, the public defender, or the defendant, as appropriate.

Comment

[1] ....

[7] When a prosecutor knows of new,

CONTINUED ON PAGE 53

Client Security Fund Reimburses Victims

At its January 22, 2009 meeting, the North Carolina State Bar Client Security Fund Board of Trustees approved payments of $109,491.51 to 18 clients who suffered financial losses due to the misconduct of North Carolina lawyers. The board also received information on 11 claims filed against Michelle Shepherd pursuant to an expedited process adopted by the board in July 2008 through which its counsel could approve reimbursement of title insurance premiums retained by Shepherd that were never paid to a title insurance company. The 11 expedited claims paid since the last board meeting totaled $3,829.85.

The new payments authorized were:

1. An award of $1,800.00 to an applicant who suffered a loss from a personal injury matter handled by Charles Alston Jr. of Charlotte. The board found that Alston was retained to represent a couple who were injured in an auto accident. Alston settled the case but failed to make disbursements to his clients' medical provider from the settlement proceeds. Alston's trust account balance was insufficient to pay all his clients' obligations due to his misappropriation and dishonest conduct. Alston was disbarred on October 2, 2008. The board previously reimbursed two other Alston clients a total of $1,700.00.

2. An award of $7,000.00 to a former client of Charles Alston Jr. The board found that Alston received $7,000.00 from his client that was to be sent to the client's lender to save her home from foreclosure. Alston misappropriated the funds and the client's home was foreclosed upon. This claim was conditionally approved and will be paid when the applicant provides further proof that Alston received the funds that the claimant borrowed and intended to give to Alston.

3. An award of $5,901.87 to a former client of Charles Alston Jr. The board found that Alston was retained to handle a personal injury matter. Alston settled the case and deposited the funds into his trust account, but failed to make all the proper disbursements.

4. An award of $4,495.43 to a former client of Charles Alston, Jr. The board found that Alston was retained to handle a personal injury matter. Alston settled the case and deposited the funds into his trust account, but failed to make all the proper disbursements.

5. An award of $2,000.00 to an applicant who suffered a loss from a personal injury matter handled by Charles Alston Jr. The board found that Alston was retained to represent a client who was injured in an auto accident. Alston settled the case but failed to make disbursements to his client's medical provider from the settlement proceeds.

6. An award of $1,000.00 to a former client of Charles Alston Jr. The board found that Alston was retained to represent the client on criminal charges. Alston failed to provide any valuable legal services for the fee paid.

7. An award of $2,100.00 to a former client of Darryll Bolduc of Charlotte. The board found that Bolduc was retained to represent the client in a wrongful termination case. The client paid Bolduc funds that were to be deposited into Bolduc's trust account to draw from to pay both fees and costs. Although Bolduc did provide some significant legal services for the client, Bolduc failed to pay an expert for services provided on the client's behalf. Bolduc died on September 17, 2007. The board previously reimbursed four other Bolduc clients a total of $16,728.30.

8. An award of $1,500.00 to a former client of Thomas D. Brown of Charlotte. The board found that Brown was retained to handle a collection matter. Brown obtained a default judgment and collected funds in the matter, but failed to disburse the funds collected to the client. Brown's trust account balance was insufficient to pay all his clients' obligations due to his misappropriation. Brown was disbarred on March 5, 2008. The board previously reimbursed four other Brown clients a total of $32,250.86.

9. An award of $929.44 to a former client of Michelle Mallard of Charlotte. The board found that Mallard handled a closing for a client and failed to disburse the excess closing funds to the client. Mallard's trust account balance was insufficient to pay all her clients' obligations due to her misappropriation. Mallard was disbarred on September 24, 2008. The board previously reimbursed another Mallard client $485.00.

10. An award of $25,549.60 to a former client of Michelle Shepherd of West Jefferson. The board found that Shepherd received $25,000.00 from the client to be held in escrow for a real estate purchase. After the purchase was not consummated, Shepherd failed to return the escrow deposit. Shepherd conducted three separate closings for the client from which she received $549.60 in title insurance premiums. Shepherd failed to purchase the title insurance for the client. Shepherd's trust account balance was insufficient to pay all her clients' obligations due to her misappropriation. Shepherd was disbarred on July 25, 2008. The board previously reimbursed three other Shepherd clients a total of $171,416.48. In addition, the board had reimbursed 68 Shepherd clients a total of $26,122.76 in title insurance premiums through the expedited claims process.

11. An award of $40,000.00 to former clients of Michelle Shepherd. The board found that Shepherd handled a closing and retained $40,000.00 from the sales proceeds to be held as a "road escrow." Shepherd failed to disburse the funds once the road building was approved.

12. An award of $150.00 to an applicant who suffered a loss from a closing handled by Michelle Shepherd. The board found that Shepherd failed to pay an appraisal fee from the sales proceeds which the lender applicant then paid.

13. An award of $300.00 to an applicant who suffered a loss from a closing handled by Michelle Shepherd. The board found that Shepherd failed to pay the applicant out of the closing proceeds for an appraisal done on a property closed by Shepherd.

14. An award of $665.17 to an appli-

cant who suffered a loss from a closing handled by Michelle Shepherd. The board found that Shepherd failed to disburse some of the settlement fees due the lender applicant.

15. An award of $5,600.00 to a former client of Michelle Shepherd. The board found that Shepherd received a $5,000.00 escrow deposit from a client. After the escrow deposit was made, the State Bar froze Shepherd's trust account. The applicant had to again pay the escrow to another lawyer who closed the sale. Shepherd also conducted two other closings for the applicant in which she received $600.00 for title insurance premiums. Shepherd never obtained or paid for the title insurance.

16. An award of $2,500.00 to a former client of Marsha Stone of Asheville. The board found that Stone was retained to represent a client in a criminal matter. Stone failed to provide any valuable legal services for the fee paid. Stone abandoned her practice and later surrendered her license due to misappropriation. Stone was disbarred on October 9, 2008. The board previously reimbursed another Stone client $1,500.00.

17. An award of $3,500.00 to a former client of Marsha Stone. The board found that Stone was retained to represent a client in a domestic matter. Stone failed to provide any valuable legal services for the fee paid prior to abandoning her practice.

18. An award of $4,500.00 to a former client of Marsha Stone. The board found that Stone was retained to represent a client in a criminal matter. Stone failed to provide any valuable legal services for the fee paid prior to abandoning her practice. ■

Rule Amendments (cont.)

credible, and material evidence, received after a conviction, that a reasonable person in the position of the prosecutor would conclude casts substantial doubt on the guilt of a convicted defendant, the prosecutor shall disclose the evidence to enable investigation by an appropriate authority or by the convicted defendant. Evidence that effectuates the duty to disclose must be sufficiently clear and convincing so as to cast substantial doubt on the guilt of a convicted defendant. The prosecutor is not required to initiate an investigation or to take remedial action. The duty to disclose applies without regard to the jurisdiction in which defendant was convicted. The disclosure may be made, as appropriate, to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred, the North Carolina Innocence Inquiry Commission, the public defender in the district in which the defendant was convicted, or the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[8] A prosecutor's independent judgment, made in good faith, that the evidence is not of such nature as to trigger the disclosure obligation of section (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule. ■

Ethics Opinions (cont.)

citizen. Lawyer believes the mother is a Mexican citizen and suspects she is an undocumented alien.

The basis of the suit is injury to the child during birth. Plaintiff's counsel has forecast damages of over $30,000,000. The amount of damages is based in part on the cost of medical care in the United States. The cost of the same medical care in Mexico would be substantially less.

May Lawyer serve plaintiffs with discovery requests that require Mother to reveal her manner of entry into the United States and the status of her citizenship or legal residence?

Opinion #1:

Yes. If the discovery requests are intended to uncover information that is relevant to the defense of the case and which is admissible evidence (or may lead to admissible evidence) and is not for the improper purpose of creating a file to use to threaten the plaintiff with deportation, to harass the plaintiff, or for some other improper purpose, lawyer is not prohibited from engaging in such discovery. *See* Rule 3.1, Rule 4.4, 2005 FEO 3.

Inquiry #2:

If Lawyer engages in the discovery and determines that Mother is in the country illegally, may Lawyer call the US Immigration and Customs Enforcement (ICE) and report the mother's status?

Opinion #2:

No, unless federal or state law requires Lawyer to report Mother's illegal status to ICE.

Rule 4.4(a) provides that, in representing a client, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Comment [4] to Rule 8.4 provides that "paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings."

It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration officials to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.

Inquiry #3:

Would the answer to either Inquiry #1 or Inquiry #2 change if Mother was not a party to the litigation? ■

Opinion #3:

No. *See* Rule 4.4(a). ■

New State Bar Councilors

Rebecca Eggers-Gryder of Boone is the new representative for Judicial District 24. Eggers-Gryder earned her undergraduate degree from Appalachian State University and her JD degree from Campbell University School of Law. Since 1986 she has been in private practice with her family law firm, Eggers, Eggers, Eggers and Eggers, PLLC. She has served the Watauga County Bar Association as secretary, treasurer, vice-president, and president, and has been president of the 24th Judicial District Bar. She is also a member of the North Carolina Bar Association.

Judicial District 27A is now represented by **Sonya Campbell McGraw** of Gastonia. McGraw earned her undergraduate degree at East Carolina University and her JD degree from Wake Forest University School of Law. She is a partner in the firm of Ferguson & McGraw. She is a member of the Gaston County Bar Association (president 1999-2000), the Gaston County Grievance Committee, and the Executive Committee of the North Carolina Conference of Bar Presidents. She is also an advisory board member of the Volunteer Lawyer's Program. McGraw has been active in several civic organizations including the Gastonia East Rotary Club, the Gaston County Schools, the Gaston County Commission on the Family, and the Domestic Violence Prevention Council. She is a recipient of the Gaston County Volunteer Lawyer's Program Distinguished Service Award.

Richard S. Towers of High Point is the new representative for Judicial District 18. Towers earned his undergraduate degree in Political Science from Monmouth University, New Jersey, in 1965 and his JD degree from Wake Forest University School of Law in 1976. From 1968-1972 he served in the United States Marine Corps as a JAG officer (defense counsel, appeals counsel, and military judge). In 1972 he was appointed to the Guilford County Public Defender's office as High Point's first full-time PD. Since 1976 he has worked as a solo practitioner. Towers is a member of the High Point Bar Association (president 1990-1991), the 18th Judicial District Bar Association, and the Middle District Federal Court. He has served the Alcohol Education Center of High Point, Alcohol and Drug Services, Substance Abuse Services of Guilford, Inc., Developmental Day Care of High Point, the High Point Volunteers to the Court, Urban Ministry, and the Alzheimer's Association.

Judicial District 22B will be represented by **Roger S. Tripp** of Lexington. Tripp earned his undergraduate degree in Political Science from East Carolina University in 1971 and his JD degree from Wake Forest University School of Law in 1974. Since 1974 he has worked with the firm at which he is now a partner—Biesecker, Tripp, Sink & Fritts, LLP. Tripp is a member of the North Carolina Bar Association, the North Carolina Advocates for Justice, the American Bar Association, the American Association for Justice, and the Davidson County Bar Association. He has served on the boards of Lexington Kiwanis Club, Lexington YMCA, Salvation Army, United Way of Davidson County, and Hospice of Davidson County. He is a past chairman of the Lexington ABC Board. ■

Seeking Distinguished Service Award Nominations

The recently-created North Carolina State Bar Distinguished Service Award program honors current and retired members of the North Carolina State Bar throughout the state who have demonstrated exemplary service to the legal profession. Such service may be evidenced by a commitment to the principles and goals stated in the Preamble to the Rules of Professional Conduct, for example: furthering the public's understanding of and confidence in the rule of law and the justice system; working to strengthen legal education; providing civic leadership to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel; seeking to improve the administration of justice and the quality of services rendered by the legal profession; promoting diversity and diverse participation within the legal profession; providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; encouraging and counseling peers by providing advice and mentoring; and fostering civility among members of the bar.

Awards will be presented in recipients' districts, usually at a meeting of the district bar. The State Bar Councilor from the recipient's district will participate in introducing the recipient and presenting the certificate. Recipients of the Distinguished Service Award will also be recognized in the State Bar *Journal* and honored at the State Bar's annual meeting in Raleigh. Members of the bar are encouraged to nominate colleagues who have demonstrated outstanding service to the profession. The nomination form is available on the State Bar's website, www.ncbar.gov, and the ***deadline for submissions is April 1, 2009***. Please direct questions to Carmen Hoyme at the State Bar office in Raleigh, (919) 828-4620. ■

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CONTACT

JOYCE LINDSAY

(919) 828-4620

OR E-MAIL DENISE MULLEN

dmullen@ncbar.gov

www.nclawspecialists.gov

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